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No.

In The

Supreme Court of the United States

October Term, 1995

V-1 OIL COMPANY, INC. d/b/a V-1 PROPANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Ninth Circuit Court of Appeals, affirming the state court's decision that V-1 Oil Company is subject to unannounced, warrantless inspections pursuant to the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 1801 *et seq.*, conflicts with the Fourth Amendment to the United States Constitution and this Court's decision in *New York v. Burger*, 482 U.S. 691 (1987).

2. Whether the government was appropriately granted permanent injunctive relief when it was based on a constitutionally infirm statute.

LIST OF PARTIES

The sole parties to this case are reflected in the caption. Petitioner, V-1 Oil Company, Inc., d/b/a/ V-1 Propane ("V-1"), has no parent companies, subsidiaries or affiliates.

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Petitioner, V-1 Oil Company, d/b/a/ V-1 Propane ("V-1"), respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 63 F .3d 909 (9th Cir. 1995) and is reprinted in the Appendix hereto at Appendix B, 2a. The Order Granting Preliminary Injunction, dated January 13, 1994 is unreported. It is reprinted in the Appendix hereto at Appendix F, 35a. The Order on Cross Motions for Summary Judgment, dated October 1 1, 1994 is unreported. It is reprinted in the Appendix hereto at Appendix D, 16a. The judgment of the District Court of Idaho, dated October 11, 1994 is unreported. It is reprinted in the Appendix hereto at Appendix E, 33a.

STATEMENT OF JURISDICTION

An appeal to the decision of the District Court of Idaho was filed on August 24, 1995. It is unreported. It is reprinted in the Appendix hereto at Appendix C, 15a. The Ninth Circuit issued its decision affirming the Distric Court of Idaho' s judgment on August 24, 1995. It is reported at 63 F .3d 909 (9th Cir. 1995), and is reprinted in the Appendix hereto at Appendix B, 2a. A timely petition for rehearing and suggestion for rehearing in banc was denied by Order on November 1, 1995. The Order appears in the Appendix at Appendix A, 1a. This petition for Writ of Certiorari is timely filed January 30, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

49 U.S.C. app. § 1808(c), provides:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> > (1) the manufacture, fabrication, marking, maintenance, recondition, repair, testing, or distribution of packages or containers for use by any person in the transportation or shipment by any person of hazardous materials in commerce; or
> >
> > (2) the transportation or shipment by any person of hazardous materials in commerce.

STATEMENT OF THE CASE

This is a case of first impression challenging the constitutional validity of the Hazardous Materials Transportation Act[1] ("HMTA"), 49 U.S.C. app. § 1801 (1975) *et seq.* which gives the Secretary of Transportation authority to authorize any officer or agent to "enter upon, inspect and examine [without a warrant and unannounced] . . . the records and properties of persons" related to the "transportation or shipment *by any person* of hazardous materials in commerce." 49 U.S.C. § 1808(c)(emphasis added). Hazardous materials include any of the nearly 16,000 items listed in the Code of Federal Regulations, 49 C.F.R. § 172.101.

Though the language of the HMTA statute does not specify which "officer, employee, or agent" may conduct inspections, the Secretary of Transportation has identified the Federal Railroad Administration ("FRA") as one agency capable of conducting inspections under 49 U.S.C. § 1808(C). They, therefore, are able to inspect the "records and properties of persons" relating to "the transportation or shipment" of "hazardous materials in commerce." 49 U.S.C. § 1808(C).

V-1 Oil Company, Inc. ("V-1"), is a liquified propane gas retailer servicing six western states. V-1 receives shipments of propane via rail which it then stores for later resale. Because propane is a hazardous material, it requires extreme caution in its handling and storage. As such, V-1 employees are specially trained and educated in the task of handling propane during the unloading process. These precautions have resulted in a high level of employee expertise.

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1. Pub. L. No. 93-633, 88 Stat. 2156 (1975), Pub. L. No. 93-633, § 113(g), 88 Stat. 2163, repealed the Railroad Safety and Hazardous Materials Transportation Control Act of 1970, No. 91-458, 84 Stat. 971 (1970).

All V-1 locations are inspected and licensed by local fire officials. These inspections are usually conducted in a cooperative manner with appointments made in advance of the inspections. Due to the hazardous nature of propane, V-1 has a strict policy of not allowing any untrained or unauthorized person(s) access to V-1 property. This standard is applied equally to everyone, including state and federal inspectors. This policy assures V-1 that persons visiting the premises are qualified and familiar with the operations, equipment and hazards associated with handling propane.

V-1 maintains propane storage facilities at 39 different sites. Since the enactment of 49 U.S.C. App. § 1808(c) in January 1975, The FRA has attempted to inspect V-1 approximately five or six times.[2] For safety reasons, V-1 asks each person who desires to enter the premises, to fill out a one-page information sheet. This information is used to ascertain the level of training and/or expertise the requesting individual has had in connection with the safe handling of propane and the type of equipment that V-1 uses in the handling and storage of propane. On each occasion, the FRA inspectors objected to V-1's safety requirement. In response, the government brought an action for injunctive relief in the United States District Court for the District of Idaho pursuant to 49 U.S.C. app. § 1810(a), seeking to enforce the HMTA and the alleged right the statute confers on agents to enter onto and inspect the premises of V-1 unannounced and without a warrant. The court granted the government's motion. Thereafter, Cross Motions for Summary Judgment were filed by the parties and the District Court granted the government's Motion for

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2. The number of inspections is in dispute. The government claims that V-1 has been inspected more times than petitioner asserts. *See* Petitioner's Lodgings, App. J, 60a. If the government has conducted additional inspections, V-1 was not aware of them. Even taking into consideration the validity of the government's claims, V-1 has not been inspected on a regular or certain basis.

Permanent Injunction while denying V-1's motion. V-1 appealed the District Court's ruling to the Ninth Circuit.

In a split vote, Justices Farris and Hawkins affirmed the District Court's ruling. The court found:

> The first two prongs of the *Burger*[3] test are easily satisfied. The government has a substantial interest in regulating the transportation and temporary storage of hazardous material to protect life and property. Also, unannounced inspections reasonably ensure that the statute is satisfactorily enforced.

United States v. V-1 Oil Company, 63 F.3d 909, 912 (9th Cir. 1995).

In finding that the third prong of the *Burger* test had been met, the court declared that "[V-1's own] activities provides adequate notice to V-1 that its property and records 'will from time to time be inspected by government of ficials.'" *Id.* at 912. (quoting *United States v. Kaiyo Maru No. 53,* 699 F.2d 989, 995 (9th Cir. 1983). Circuit Judge Noonan filed a dissenting opinion. *United States v. V-1 Oil*, 63 F.3d at 913.

On petition for rehearing, petitioner asserted that the majority had overlooked and misapprehended a material point of law when it decided the case. Petitioner maintained that the Fourth Amendment required that, for a statute which purported to authorize warrantless administrative searches, in order to withstand constitutional muster, the language of the statute must contain sufficient specificity that it is an adequate substitute for

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3. *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

a warrant. The request was denied despite Justice Noonan's vote to accept the petition for rehearing and to grant the suggestion for rehearing in banc. (App. A, 1a).

REASONS FOR GRANTING THE WRIT

This is a case of first impression challenging the constitutional validity of the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq.* The district court and Ninth Circuit Court of Appeals erroneously found that based on substantive law, V-1 Oil Company is subject to unannounced, warrantless inspections under 49 U.S.C. § 1808(c). However, the decisions of the lower courts to allow such searches directly conflicts with this Court's decision in *New York v. Burger*, 482 U.S. 691 (1987), and ignores the framework this Court provided to determine a statutes constitutional adequacy in providing for a warrantless search.

This Court's test for constitutional adequacy, under the Fourth Amendment and *New York v. Burger*, focuses strictly on the *specific* statute which purports to authorize warrantless searches and the relationship of the FRA, as a regulatory authority, to V-1 as a propane business. *United States v. Biswell*, 406 U.S. 311, 315 (1972) ("the legality of the search depends . . . on the authority of a valid statute").

"It is [] axiomatic that a business is included among 'the people' whose right the [Fourth] Amendment safeguards. *United States v. V-1 Oil Company*, 63 F.3d at 913. "To the rule requiring a warrant as the guarantee of reasonableness"[4] this Court has established specific exceptions:

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4. *United States v. V-1 Oil Company*, 63 F.3d at 913 (dissent of Circuit Judge Noonan).

> First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be 'necessary' to further the regulatory scheme. Finally, the statute's inspection program, in terms of the *certainty and regularity* of its application, [must] provid[e] a *constitutionally adequate substitute for a warrant*. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the *statute* must be 'sufficiently' comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

New York v. Burger, 482 U.S. at 702-03 (citations omitted)(emphasis added).

Both lower courts, after only a cursory discussion of the facts in light of the statute, found that the three elements of the *Burger* test had been met. In affirming the district court's findings, the Ninth Circuit found that because V-1 handles propane, it is a closely regulated business with "no reasonable expectation of privacy." *United States v. V-1 Oil*, 63 F.3d at 912. Therefore, "the government has a substantial interest" in V-1's business. *Id.* The second prong met with an equally brief and cursory analysis. The Ninth Circuit declared that unannounced

inspections reasonably ensured that the statute was being "satisfactorily enforced." *Id.* Finally, the court found that section 1808(c) of 49 U.S.C., met the third prong of the analysis because V-1's own "activities provide adequate notice that its property and records 'will from time to time be inspected by government officials.'" *Id.* (quoting *United States v. Kaiyo Maru*, 699 F.2d at 995.

The lower courts have concluded that merely because V-1 deals in propane or because they deal in a pervasively regulated business, that V-1 is automatically subject to unannounced and warrantless inspections. *United States v. V-1 Oil*, 63 F.3d at 911, 912. Just because a business may be regulated and conduct business that affects commerce does not warrant an automatic conclusion that the *Burger* test has been met. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-314 (1978), *see also New York v. Burger*, 482 U.S. at 702-703. This is *not* the standard. *Id.* Yet this is precisely the conclusion that the Ninth Circuit and the lower district courts have made.

Their decisions conflict with the analysis provided by this Court and provide no explanation regarding how the HMTA "statute [is] sufficiently comprehensive that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections." *New York v. Burger*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). By contrast, other constitutional statutes have defined precisely who will be searched. The statute in *Burger* declared that operators of vehicle dismantling businesses would be subject to regular inspections. *New York v. Burger*, 482 U.S. at 694-95, 711. In *Biswell*, the statute being challenged was the Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. § 921 *et seq.* The statute specifically provides that firearms or ammunition dealers will be inspected. *Biswell*, 406 U.S. at 311-12. Finally, in *S & S Pawn Shop, Inc. v. City of Del City*, 947 F.2d 432, 435 (10th Cir.

1991) the statute in question declared that pawn brokers would be inspected. These statutes set forth a clear and reasonable standard as to who will be subject to warrantless inspections. The standard of reasonableness which the Fourth Amendment provides must remain a shield between the people and-government intrusion, "to hold otherwise would belie the origin of that Amendment and the American colonial experience." *Marshall v. Barlow's*, 436 U.S. at 307, 311.

Despite the fact that this standard of reasonableness is lacking in the HMTA statute, hence making it a constitutionally inadequate statute, the Ninth Circuit and the district court both upheld the granting of the permanent injunction. This decision, based on the merits of the case, was due to their erroneous conclusion that the test set forth in *Burger* had been met. However, when the required finding of success on the merits is lacking, granting of the permanent injunction is in error. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975); *Burris v. Turnbo*, 743 F.2d 497, 400 (9th Cir. 1992). Therefore, since the Ninth Circuit incorrectly found the HMTA statute to be constitutional and in compliance with the standards set forth in *New York v. Burger*, the Ninth Circuit's ruling warrants review by this Court.

I.

THE DECISIONS BELOW ERODE V-1'S FOURTH AMENDMENT RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE AND DIRECTLY CONFLICT WITH THIS COURT'S CONSTITUTIONAL ANALYSIS SET FORTH IN *NEW YORK v. BURGER*.

A. The HMTA Statute Does Not Provide A Constitutionally Adequate Substitute For A Warrant.

Although this Court has carved out an exception to the warrant requirement of the Fourth Amendment "for industries that are closely regulated," it stated "even in the context of a pervasively regulated business, a warrantless inspection will be deemed reasonable *only* where the "statute's inspection program, in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. at 703.

> In other words, *the regulatory statute* must perform the two basic functions of a warrant:
>
> > (1) it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and
> >
> > (2) it must limit the discretion of the inspecting officers.

Id. (quoting *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323 (1978). It is the specific statute, which purports to provide warrantless searches, which must be "sufficiently comprehensive and

defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *New York v. Burger*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. at 600).

The lower courts finding that "V-1's extensive activities relating to the transportation of propane," "provide[s] adequate notice that its records will from time to time be inspected by government officials," is in direct conflict with this Court's holding that it is the *regulatory statute* which must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections." *United States v. Kaiyo Maru*, 699 F.2d at 995 (quoting *Donovan v. Dewey*, 452 U.S. at 600). When the HMTA statute is analyzed pursuant to the framework provided by the Court in *Burger*, it is apparent that it does not pass the standard of reasonableness which the Fourth Amendment requires. As Circuit Judge Noonan stated in his dissent, "there has to be 'a constitutionally adequate substitute for a warrant,' and that substitute must be the statute being enforced." *United States v. V-1 Oil*, 63 F.3d at 914 (Noonan, J., dissenting)

B. The HMTA Statute Provides No *Certainty Or Regularity* As Required By The Fourth Amendment And *New York v. Burger*.

The HMTA statute provides:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —

> (1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution or packages or containers for use by any person in the transportation of hazardous materials in commerce; or
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.

49 U.S.C. app. § 1808(c). The Act defines transportation as "any movement of property by any mode." 49 U.S.C. app. § 1802(15). In addition, hazardous materials are defined in the Code of Federal Regulations, 49 C.F.R. § 172.101, to include 16,000 different substances, substances used in every home and of fice in this country. Justice Noonan accurately noted that *anyone* could be subject to unannounced and warrantless inspections based on the definition of hazardous materials. In his dissenting opinion he declared:

> The list [of hazardous materials] begins with "Accellerene," proceeds to "Aerosols" (corrosive, flammable, non-flammable, and poison), goes on to "Air bag inflators", continues through "Batteries" (dry and wet), through "Carbon dioxide or Dry ice", through "Dyes" (liquid or solid), through "Extracts, flavoring, liquid," and so on. The list even included "Matches, safety" and "Wheelchairs, electric". No doubt every one of the listed materials can be hazardous in some use. The businesses involved . . . must be legion. The list of materials is so long and so many businesses must be involved in the

> transportation of the materials in commerce that no business within the enumerated categories could be sure if it would ever be visited by inspectors. If certainty and regularity are the constitutional substitutes for a warrant, they are, by the very nature of the broad swatches of business regulated, absent.

United States v. V-1 Oil, 63 F.3d at 913, 914. According to the language of the HMTA statute, the corner grocery store that receives "Dyes" (liquid or solid), . . . "Extracts, flavoring, liquid" etc., could be subject to warrantless and unannounced inspections by FRA inspectors. *Id.* There is nothing in this broad and all encompassing language that advises the owners or operators of these products that they will or should be subject to an unannounced inspection; nor does it "inform the operator of a [] business that inspections will be made on a regular basis." *New York v. Burger*, 482 U.S. at 711.

In cases where warrantless inspection statutes have been upheld, inspections *were* conducted on a regular basis. *New York v. Burger*, 402 U.S. at 711; *Donovan v. Dewey*, 452 U.S. at 599; *United States v. Kaiyo Maro*, 699 F.2d at 996. In *Donovan*, that statute provided that mines were inspected four times per year . *Donovan v. Dewey*, 452 U.S. at 603. In *Kaiyo Maro*, this Court found that Coast Guard inspections of foreign fishing vessels, once every three months, met this important criterion stating, "[t]he inspections are not so random or infrequent that the vessel owner has no real expectation that his property will from time to time be inspected by government officials." *United States v. Kaiyo Maro*, 699 F.2d at 996.

In contrast, the Federal Railroad Administration inspections have been random and infrequent. V-1 owns propane facilities in

six western states. It maintains propane storage facilities at 39 sites. Six of these facilities border on railroad tracks. The Hazardous Materials Transportation Act, 49 U.S.C. app. § 1808(c) became effective on January 3, 1975, and yet, over the next fifteen (15) years no request or other attempt was made pursuant to this statute to inspect any V-1 facility, warrantless or otherwise, until November, 1990. Subsequent to the government's grant of preliminary injunction, only five V-1 facilities have ever been inspected by the FRA. This random, infrequent and unpredictable inspection "routine" provides V-1 with absolutely no expectation that its private commercial property is subject to unannounced, warrantless inspection by government officials with unchecked discretion. *United States v. V-1 Oil*, 63 F.3d at 914.

The regulatory scheme of the HMTA statute is so unrestrictive that V-1, and other property owners in similar circumstances, are exposed to "the unbridled discretion [of] executive and administrative officers, particularly those in the field." *Marshall v. Barlow's*, 436 U.S. at 323. In those cases where the statutes were held unconstitutional, the statute left "inspectors free to inspect any business as often or seldom as he or she please[d]." *V-1 Oil Company v. State of Wyoming Department of Environmental Quality*, 902 F.2d 1482 (10th Cir. 1990), *cert. denied*, 498 U.S. 920 (1990). As Ninth Circuit Judge Noonan noted, "[i]f certainty and regularity are the constitutional substitutes for a warrant, they are, by the very nature of the broad swatches of business regulated, absent." *United States v. V-1 Oil*. 63 F.3d at 914.

Although the district court found the HMTA statute was constitutional, in order to comply with the requirements of this Court's analysis, it was compelled to add specific and clarifying language to the injunction. (App. F, 46a, 47a). The statute states that inspections will be made at "reasonable times." 49 U.S.C.

app. § 1808(c). The injunction issued by the district court clarifies this language to read "during regular business hours." (App. F, 46a). Where the statute reads that inspections shall relate to "the transportation or shipment by any person of hazardous materials in commerce" 49 U.S.C. app. § 1808(c)(2), the injunction clarifies this language to read that inspections shall relate to "entities engaged in the shipment, transportation, and receipt of hazardous materials *by rail*." (App. F, 47a) (emphasis added). The lower court's need to clarify and narrowly tailor the language of the injunction serves to highlight the inherent inadequacies of the HMTA statute.

C. Warrantless Inspections Are Not Necessary To The Regulatory Scheme.

The constitutional analysis also requires that the government show that unannounced, warrantless inspections are essential to the success of their regulatory scheme. The government's failure to attempt any inspection for fifteen (15) years after enactment of the statute, does not support its ar gument that "surprise," warrantless inspections are "necessary" to the success of the regulatory scheme. In other cases before this Court, inspections were necessary and ef fective to "serve as a credible deterrent" to illegal practices and behaviors. *New York v. Burger*, 482 U.S. at 710 (stolen property passing through junkyards); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970) (illegal, illicit liquors being sold without being taxed or regulated).

In the present case, there is no illegal behavior to deter , nor have any "surprise" inspections "caught" V-1 in any violations which might be temporarily corrected in order to frustrate the FRA's enforcement efforts. The purpose of the regulation has been characterized by the government as the need to enforce safe transportation of hazardous materials. The FRA "surprise"

inspections have revealed that: (1) the shipping papers contained wording different from the required wording (Petitioner's Lodging, App. I, 59a); (2) V-1's sign had 3 inch letters instead of 3.9 inch letters, (Petitioner's Lodging, App. I, 59a); and (3) one of V-1's signs had rust on it. (Petitioner's Lodging, App. I, 59a). These violations do not constitute evanescent evidence that can disappear from the premises quickly like stolen property from a junkyard (*New York v. Burger*, 482 U.S. at 710); nor is the behavior illegal like selling untaxed alcohol or deadly weapons. *Colonnade Catering Corp. v. United States*, 397 U.S. at 71; *United States v. Biswell*, 406 U.S. at 311. It is also curious that the government, who insists that "surprise" inspections will further the regulatory scheme, objects to V-1's requirement that all individuals who desire entry to the premises, including government officials, document their qualifications to handle propane or other hazardous materials.

While the government argues that surprise inspections are necessary for enforcement purposes, "surprise inspections are, by definition, irregular and uncertain, just the opposite of what is constitutionally the equivalent of a warrant. The asserted need of such inspections suggests that government is seeking to obtain by the equivalent of the detested general warrant what is only available to it constitutionally on a showing of probable cause." *United States v. V-1 Oil*, 63 F.3d at 914.

D. The Statute Fails To Limit The Discretion Of The Inspecting Agents.

"To satisfy the 'certainty and regularity' requirement, an 'inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches.'" *Serpas v. Schmidt*, 827 F.2d 23, 29 (7th Cir. 1987). This Court has noted that "[a] warrant, or a statute authorizing warrantless inspections, "must advise the owner [of commercial property] of

the scope and objects of the search," (*Marshall v. Barlow's Inc.*, 436 U.S. at 323) and "should place appropriate restraints upon the discretion of the inspecting officers." *New York v. Burger*, 482 U.S. at 711. In *Donovan v. Dewey*, the Court stated:

> the Act does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search. The statute instead simply provides that such searches must be performed "at . . . reasonable times, and within reasonable limits and in a reasonable manner."

Donovan v. Dewey, 452 U.S. at 601. Similarly, the HMTA statute provides that "any . . . employee" of the FRA, authorized by the Secretary, may enter the V-1 premises "at reasonable times and in a reasonable manner." 49 U.S.C. app. § 1808(c). This language is clearly insufficient in light of this Court's holding in *Donovan*.

Yet, the Ninth Circuit held that "[t]he statute also limits the discretion of inspecting officers;" and the "permissible scope of these searches is narrowly defined to business premises and records that relate to the transportation of hazardous materials." *United States v. V-1 Oil*, 63 F.3d at 912. However, the *only* attempt at limiting the discretion of the FRA field agents is the FRA Manual which ostensibly limits the inspector to *his own normally assigned hours*. If, however, an inspection occurs outside these normally assigned hours, the inspector need only "notify his/her Regional Specialist." (App. H, 58a).

The government contends that warrantless inspections are necessary to prevent irreparable injury to public health and there is no adequate remedy at law. However, the unrestrained discretion and access of FRA inspectors is not necessary to protect the public health. The government's primary concern is

inconvenience, and loss of the power of intimidation it will suf fer should it be required to seek an administrative warrant for its "surprise" inspections. "That compliance with the fourth amendment is burdensome on government of ficials is immaterial." *McLaughlin v. Kings Island*, 849 F.2d 990, 997 (6th Cir. 1988). "We doubt that the consumption of enforcement energies in the obtaining of [administrative] warrants will exceed manageable proportions." *Marshall v. Barlow's*, 436 U.S. at 317.

II.

BECAUSE THE NINTH CIRCUIT GRANTED THE GOVERNMENT'S MOTION FOR INJUNCTIVE RELIEF BASED ON A CONSTITUTIONALLY FLAWED STATUTE, THE INJUNCTION MUST BE LIFTED.

The Ninth Circuit and the district court' s merely stated, in conclusory fashion, that because the statute was constitutional, grant of injunction was proper and not an abuse of discretion. *United States v. V-1 Oil*, 63 F.3d at 913. However, both court's erred in applying the relevant substantive law to the evidentiary findings necessary to warrant injunction. As noted *supra*, the injunction was based on a constitutionally infirm statute. [5] Therefore, the required finding of success on the merits for permanent injunction was erroneous. [6] Grant of injunction must also include specific findings of irreparable harm; inadequate remedy at law; and furtherance of public interest. [7]

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5. A permanent injunction may only be issued after a right thereto has been established on the merits. Charles Wright & Arthur Miller, *Federal Practice and Procedure: Civil* § 2941 at 361.

6. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975); *Burris v. Turnbo*, 743 F.2d 497, 400 (9th Cir. 1992).

7. *Id.*

The only irreparable harm to be found in this case, is the harmed caused by the progressive and insidious erosion, by the government, specifically the Federal Railroad Administration, of constitutional guarantees. While irreparable harm may result from an explosion, irreparable harm will not result if the FRA is required to obtain an administrative warrant (if the element of surprise is indeed required) or seek permission to inspect. The district court also concluded that seeking a warrant was an inadequate remedy at law "because of the burden . . . placed on the government." *United States v. V-1 Oil*, 63 F.3d at 913. However, this is clearly an erroneous interpretation of the relevant substantive law. "[T]hat compliance with the fourth amendment [may be] burdensome on government of ficials is immaterial." *McLaughlin v. King's Island*, 849 F.2d at 996-97. Quoting this Court's *Burger* decision, the Sixth Circuit noted that the burden of enforcement is not the test for warrantless search and seizure. *Id.* Such intrusions must squarely pass the *Burger* analysis.

In *Marshall*, this Court recognized the administrative warrant as an adequate remedy at law and noted that it was doubtful "that the consumption of enforcement ener gies in the obtaining of such warrants will exceed manageable proportions." *Marshall v. Barlow's*, 436 U.S. at 320-21. The district court noted that "advance notice . . . [would] . . . frustrate the inspection effort," and be burdensome to the government. (App. D, 25a, 29a). The Ninth Circuit stated that "the injunction cannot reasonably be construed as permitting searches that would otherwise be prohibited." *United States v. V-1 Oil*, 63 F.3d at 913. However, this argument denies that V-1, whom this Court has determined is included among "the people" whose rights the Amendment safeguards,[8] is "no longer secure in the possession of the premises and papers that are guaranteed against unreasonable search." *Id.* at 913, 914.

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8. *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

CONCLUSION

The Fourth Amendment is peremptory. It protects the rights of people and businesses, *See v. City of Seattle*, 387 U.S. 541, 543, (1967), "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This right shall not be violated. Under *New York v. Burger* and its progeny, this Court has drafted specific and limiting exceptions to the Fourth Amendment. Specifically, a statute authorizing unannounced and warrantless inspections *must* satisfy the test articulated in *Burger*. Should such a statute fail to do so, it must be declared unconstitutional.

In this case, the HMTA statute clearly fails to meet constitutional muster. The HMTA statute does not provide any "certainty" or "regularity" in its application. It fails to provide an adequate substitute for a warrant. The mere fact that V-1 is a regulated business does not strip it of its right to be free from unreasonable searches and seizures.

The overriding concern by the FRA and the lower courts is that it would be too inconvenient to obtain a warrant allowing a search of V-1's property. While this may be true, inconvenience is not a valid justification for compromising V-1's Fourth Amendment rights.

The United States Supreme Court has not reviewed a state or circuit court decision in this area since its decision in *Burger*. V-1 Oil Company respectfully requests that this Court accept its Petition for Writ of Certiorari and again provide the lower courts with direction in interpreting the Fourth Amendment as it applies to administrative searches and prevent the further erosion the rights of "the people" to be free of unreasonable searches and seizures.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 94-36178

D.C. No. CV-93-00333-HLR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

V-1 OIL COMPANY, d/b/a V-1 PROPANE,

Defendant-Appellant.

ORDER

Before: FARRIS, NOONAN, and HAWKINS, Circuit Judges.

Judges Farris and Hawkins have voted to deny appellant's petition for rehearing. Judge Hawkins has voted to reject the suggestion for rehearing en banc and Judge Farris so recommends. Judge Noonan has voted to accept the petition for rehearing and to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 24, 1995

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. V-1 OIL COMPANY, d/b/a V-1 PROPANE, *Defendant-Appellant.*	No. 94-36178 D.C. No. CV-93-00333-HLR OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
July 18, 1995—Seattle, Washington

Filed August 24, 1995

Before: Jerome Farris, John T. Noonan, Jr.,
and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Farris; Dissent by Judge Noonan

SUMMARY

Government Law/Transportation/Business Law

Appendix B

The court of appeals affirmed a district court judgment. The court held that warrantless, unannounced inspections under the Hazardous Materials Transportation Act (HMTA) do not violate the Fourth Amendment rights of a propane gas retailer whose employees unload and transfer propane shipments and return empty rail cars.

Appellant V-1 Oil Co., a liquefied propane gas retailer, receives propane gas by rail. Although V-1 does not own the rail cars, its employees unload and transfer the propane shipments to company storage tanks. V-1 employees return the empty rail cars to distributors.

The HMTA gives the Secretary of Transportation authority to regulate the transportation and handling of hazardous materials. The Secretary may conduct warrantless, unannounced inspections of property or records that involve transportation of hazardous materials. The statute and regulations provide that the inspections must be conducted at reasonable times and in a reasonable manner. The Secretary delegated oversight responsibility for transportation by rail to the Federal Railroad Administration (FRA).

A FRA inspector attempted to inspect a V-1 facility, but V-1 denied permission. The federal government sued to enjoin V-1 from preventing inspections. The district court granted the government's motion for a preliminary injunction, and concluded that warrantless searches under the HMTA come within an exception to the warrant requirement for administrative searches of commercial premises used in a "closely regulated" industry. V-1 appealed, contending that the FRA's warrantless, unannounced searches violate the Fourth Amendment.

Appendix B

[1] The district court was correct in concluding that V-1 is a closely regulated industry because it transports and sells hazardous materials. Because it transports, stores and sells propane gas, V-1 has a reduced expectation of privacy. [2] The government has a substantial interest in regulating the transportation and temporary storage of hazardous materials. And, unannounced inspections reasonably ensure that the HMTA is satisfactorily enforced. [3] The HMTA, as applied to V-1, provides an adequate substitute for a warrant. The HMTA satisfactorily gives notice to the types of businesses subject to inspection. V-1 is subject to FRA inspections only because of its extensive activities related to transporting propane gas. V-1's activities provide adequate notice that its property and records will be inspected. [4] The HMTA also limits the discretion given to inspecting officers. The permissible scope of the searches is narrowly defined, and inspections may be conducted only at reasonable times and in a reasonable manner.

[5] A permanent injunction that permits the enforcement of a statute that meets constitutional muster does not constitute an abuse of discretion.

Circuit Judge Noonan dissented, writing that nothing in the HMTA assures a program that will have "certainty and regularity" in application.

COUNSEL

Peter Stirba, Stirba & Hathaway, Salt Lake City, Utah, for the defendant-appellant.

John F. Daly, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

Appendix B

OPINION

FARRIS, Circuit Judge:

The principal question is whether warrantless, unannounced inspections under the Hazardous Materials Transportation Act violate V-1's Fourth Amendment rights. We hold that they do not and affirm.

I. FACTS

V-1 Oil Company is a liquefied propane gas retailer in six western states. It receives propane gas by rail from Canadian distributors. Although V-1 does not own the rail cars, V-1's employees unload and transfer the propane shipments to the company's storage tanks. V-1's employees then return the empty rail cars to the distributors.

Congress enacted the Hazardous Materials Transportation Act ("HMTA") in 1975. The Act gives the Secretary of Transportation extensive authority to regulate the transportation and handling of hazardous materials. As part of the Secretary's authority, he may conduct warrantless, unannounced inspections of property or records that involve the transportation of hazardous materials. The statute and regulations provide that inspections must be conducted at reasonable times and in a reasonable manner. The Secretary has delegated oversight responsibility for all transportation by rail to the Federal Railroad Administration ("FRA").

In 1990 an FRA inspector attempted to inspect V-1's facility in Idaho Falls. V-1 denied permission for the inspection unless the inspector complied with V-1's safety policies. V-1 required all government inspectors to fill out its "Form 130." The form asks for the inspector's name, title, and agency; the

reason or purpose for the visit; the statutory or other authority for the inspection or visit; and the inspector's qualifications and experience. If V-1 approves, it then schedules an inspection for a time when its business operations will not be interrupted or impeded. FRA sought to inspect V-1's property and records three more times from 1992-93. Each time V-1 refused unannounced inspections.

In August 1993, the United States filed this action under 49 U.S.C. App. § 1810 to enjoin V-1 from preventing inspections. The district court granted the government's motion for a preliminary injunction in January 1994. The parties then submitted cross-motions for summary judgment. The district court again ruled in favor of the government. It concluded that warrantless searches under the HMTA fall within "a well-recognized exception to the warrant requirement for administrative searches of commercial premises employed in a 'closely regulated' industry." V-1 appeals.

II. DISCUSSION

A. WARRANTLESS SEARCHES OF V-1 UNDER THE HMTA DO NOT VIOLATE THE FOURTH AMENDMENT

V-1 argues that FRA's warrantless, unannounced searches violate the Fourth Amendment. In *New York v. Burger*, 482 U.S. 691, 702-03 (1987), the Supreme Court held that warrantless searches of closely regulated industries do not violate the Fourth Amendment if 1) the underlying regulatory scheme advances a substantial government interest, 2) the warrantless inspection program is necessary to further the regulatory scheme, and 3) the program provides a "constitutionally adequate substitute for a warrant."

Appendix B

[1] The district court properly concluded that V-1 is a closely regulated industry because it transports and sells hazardous materials. V-1 admits that it is regulated by 331 state and federal agencies. Nevertheless, it argues that it is not part of the railroad industry and is not pervasively regulated by FRA. We reject the argument. V-1's privacy expectations are not necessarily triggered by the particular agency conducting the search. V-1 has a reduced expectation of privacy because it transports, stores, and sells propane gas. The Fourth Amendment exception applies to "certain *industries*" regardless of the agency that has oversight jurisdiction. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (emphasis added) (stating that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise").

[2] The first two prongs of the *Burger* test are easily satisfied. The government has a substantial interest in regulating the transportation and temporary storage of hazardous materials to protect life and property. Also, unannounced inspections reasonably ensure that the statute is satisfactorily enforced. *See United States v. Biswell*, 406 U.S. 311, 316 (1972) (stating that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential"). Advanced notice of inspections could permit V-1 to temporarily correct violations and frustrate enforcement efforts. *See id.*

Under the third prong of the *Burger* test, a statute's inspection program constitutes an adequate substitute for a warrant if the owner of commercial property knows that his property will be subject to periodic inspections undertaken for specific purposes, and if the inspection program is limited in time, place, and scope. *Burger*, 482 U.S. at 703. V-1 alleges that the

statute does not satisfy the third prong because it "applies to everyone in interstate commerce who uses any [hazardous materials]." V-1 also asserts that the scope of searches by FRA is "unlimited."

[3] We have carefully considered V-1's arguments. The statute, as applied to V-1, provides an adequate substitute for a warrant. The HMTA satisfactorily notifies the types of businesses subject to inspection. 49 U.S.C. App. § 1808(c)[1] provides:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> (1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.

---

[1]After the parties submitted their cross-motions for summary judgment, Congress repealed and replaced the relevant statutory provisions as part of a broad recodification of federal transportation laws. 49 U.S.C. §§ 5101-5127. We note that the recodified provisions "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 103-272, § 6(a), 108 Stat. 1378. The recodified provisions, however, do not apply to "proceedings that were begun before the date of enactment of this Act." Pub. L. No. 103-272, § 7(b), 108 Stat. 1379.

V-1 is subject to inspections by the FRA only because of its extensive activities relating to the transportation of propane gas. V-1 itself unloads the propane from the rail cars into its storage facilities. The Act applies to the process of unloading rail cars filled with hazardous materials. 49 C.F.R. § 174.67. V-1 then returns the rail cars to the original shipper. Because they contain residual amounts of a hazardous material, V-1 must seal and mark the rail cars, and document their return. 49 C.F.R. § 173.29. These activities provide adequate notice to V-1 that its property and records "will from time to time be inspected by government officials." *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 995 (9th Cir. 1983).

[4] The statute also limits the discretion of inspecting officers. The permissible scope of these searches is narrowly defined to business premises and records that relate to the transportation of hazardous materials. *See Burger*, 482 U.S. at 711 (noting that the New York statute limits the scope of inspections to records and vehicles on the business premises). HMTA's regulations "set[ ] forth the scope of the inspection and . . . places the operator on notice as to how to comply with the statute." *See id.* Finally, FRA inspections may be conducted only at reasonable times and in a reasonable manner. FRA's enforcement manual requires inspections to be conducted during normally assigned office hours unless the inspector has previously notified his Regional Specialist. *See id.* (noting that "officers are allowed to conduct an inspection only 'during [the] regular and usual business hours' "). We may examine established agency policy when considering the discretion of inspecting officers. *Kaiyo Maru No. 53*, 699 F.2d at 996 n.17.

B. PERMANENT INJUNCTIVE RELIEF

V-1 argues that permanent injunctive relief is inappropriate

for two reasons. First, it asserts that the injunction is not sufficiently specific to satisfy Federal Rule of Civil Procedure 65(d). Rule 65 (d) provides that injunctions "shall be specific in terms [and] shall describe in reasonable detail . . . the act or acts sought to be restrained." We will not set aside injunctions under Rule 65(d) "unless they are so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).

The district court's injunction requires V-1 to allow warrantless administrative searches "for the purpose of enforcing the [HMTA] and its implementing regulations." This language is not ambiguous. The injunction cannot reasonably be construed as permitting searches that would otherwise be prohibited. V-1 has legal remedies available if FRA engages in improper searches.

[5] V-1 also argues that the requirements for a permanent injunction have not been satisfied. We review the grant of a permanent injunction for abuse of discretion. *Multnomah Legal Services Workers Union v. Legal Services*, 936 F.2d 1547, 1552 (9th Cir. 1991). The district court's injunction merely provides that V-1 must permit FRA to administer the HMTA. The statute is constitutional. A permanent injunction permitting the enforcement of a statute that meets constitutional muster is not an abuse of discretion.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The Fourth Amendment is peremptory: "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated . . . ." The Amendment then prescribes the conditions under which search warrants shall issue. It is axiomatic that a properly-issued search warrant is the way a government normally complies with the Amendment's prohibition of an unreasonable search. *Katz v. United States*, 389 U.S. 347, 357 (1967). It is equally axiomatic that a business is included among "the people" whose right the Amendment safeguards. *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

To the rule requiring a warrant as the guarantee of reasonableness, courts have fashioned exceptions, among them the exception invoked here where " 'the statute's inspection program, in terms of the certainty and regularity of its application [provides] a constitutionally adequate substitute for a warrant.' " *New York v. Burger*, 482 U.S. 691, 703 (1987), quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

Nothing in the statute at issue assures a program that will have "certainty and regularity" in its application. By regulation, there are over 2,000 hazardous materials. 49 C.F.R. § 172.101, "Hazardous Materials Table." The table listing the materials runs for 240 pages in the regulation. The list begins with "Accellerene," proceeds to "Aerosols" (corrosive, flammable, non-flammable, and poison), goes on to "Air bag inflators", continues through "Batteries" (dry and wet), through "Carbon dioxide or Dry ice", through "Dyes" (liquid or solid), through "Extracts, flavoring, liquid," and so on. The list even includes "Matches, safety" and "Wheelchairs, electric". No doubt every one of the listed materials can be hazardous in some use. The businesses involved in manufacturing, fabricating, marking, maintaining, reconditioning, repairing, and testing of packages or containers for use in the transportation of such materials must be legion. The list of the materials is so long and so many businesses must be involved

in the transportation of the materials in commerce that no business within the enumerated categories could be sure if it would ever be visited by inspectors. If certainty and regularity are the constitutional substitutes for a warrant, they are, by the very nature of the broad swatches of business regulated, absent.

As applied to V-1 the statute is equally lacking in certainty and regularity. From January 1, 1975 to November 1, 1990 the Federal Railroad Administration had never inspected or attempted to inspect V-1's premises. This large fact alone destroys any claim of certainty and regularity in the program commanded by the statute. After November 1, 1990 there was one attempted inspection and three inspections made possible by the Preliminary Injunction while this case was being appealed. These four instances fail to establish certainty and regularity of inspection over the past twenty years. To the contrary, the evidence shows great uncertainty, great irregularity, and a long period in which no inspection was even attempted.

The court meets this evidence by accepting an allegation in V-1's brief, that V-1 is subject to regulation by 331 state and federal agencies. To be sure, it is a regulated business. But there is no evidence that the kinds of regulations to which it is subject are a substitute for a search warrant. The exception to the Fourth Amendment created by the Supreme Court holds where the statute being applied, not some other statute, is a constitutional substitute for a search warrant. The dicta from *Marshall v. Barlows, Inc.*, 436 U.S. 307, 313 (1978) are clearly qualified by the standard laid down in *Donovan* and *Burger*: there has to be "a constitutionally adequate substitute for a warrant," and that substitute must be the statute being enforced. The court proceeds as if applying the rule set out in Scripture: "To him who has it shall be given, and as to him

who does not have, even that he thinks he has shall be taken from him." *Luke* 8:18. However true as a rule of spiritual life, this maxim seems an inadequate principle for interpreting a constitutional right. Heavily regulated a business may be; it is entitled to be secure in the privacy which remains to it.

The curious argument is made by the government, and accepted by the court, that the warrantless inspections are necessary because surprise is important for enforcement. Surprise inspections are, by definition, irregular and uncertain, just the opposite of what is constitutionally the equivalent of a warrant. The asserted need of such inspections suggests that government is seeking to obtain by the equivalent of the detested general warrant what is only available to it constitutionally on a showing of probable cause.

In *See v. Seattle* the routine, periodic, city-wide check of commercial establishments to assure compliance with the city's fire code was held not to justify the fire chief's warrantless attempt to enter a warehouse. *See*, 387 U.S. 541, 546. The requirements of the Fourth Amendment were upheld even though it was a matter of record that warrantless administrative inspections discovered thousands of hazardous violations in major American cities. *Id.* at 551 (dissent). I fail to see how the Federal Railroad Administration's mission is more serious than a city fire chief's, or how its sporadic visitations are a better substitute for a warrant than the fire chief's routine checks.

Courts have been careful to preserve the Fourth Amendment on behalf of criminals and criminal enterprises by enforcing an extra-constitutional rule of suppressing evidence obtained in violation of its guarantee. *Weeks v. United States*, 232 U.S. 383, 394 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). The judgment has been made that the loss in effi-

ciency of the criminal justice system is more than compensated by the efficacy given the Amendment. At least an equal zeal to uphold the constitutional command is appropriate when an administrative agency of government seeks randomly to rummage through the records of a lawful business. The consequences of unwarranted intrusion by the government are heavier for the criminal; the affront to privacy is equal, whether the government's purpose is criminal law enforcement or civil regulation. In either case "the people" — that is, all of us — are no longer secure in the possession of the premises and papers that are guaranteed against unreasonable search.

I respectfully dissent.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-36178
CT/AG#: CV-93-00333-HLR

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

V-1 OIL COMPANY, d/b/a V-1 Propane

Defendant-Appellant

APPEAL FROM the United States District Court for the District of Idaho (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 24, 1995.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO DATED OCTOBER 11, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIVIL NO. 93-0333-E-HLR

UNITED STATES OF AMERICA,

Plaintiff,

v.

V-1 OIL COMPANY, INC., d/b/a V-1 PROPANE,

Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. FACTS AND PROCEDURE

The plaintiff in the above-entitled matter is the United States, specifically the Federal Railroad Administration (FRA). The defendant is V-1 Oil Company, Inc. (hereinafter "V-1 Oil"), which is engaged in the transportation, shipment, and receipt of petroleum products by rail, including propane (liquified petroleum gas). V-1 Oil later offers these products for sale. V-1 Oil has many branches in the western United States, including two in the State of Idaho — one in Idaho Falls and one in Caldwell.

Appendix D

This case centers around the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801, *et seq.* This statute was enacted to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the nation adequately from the risks to life and property inherent in the transportation of hazardous materials in commerce. *See* 49 U.S.C. app. § 1801. The Secretary of Transportation has delegated to the FRA the authority to administer the statute and its implementing regulations as they relate to the shipment and transportation of hazardous materials by rail. *See* 49 C.F.R. § 1.49(s)(1).

The statute provides that the Secretary of Transportation shall designate particular materials as hazardous, and promulgate necessary regulations regarding the safe shipment, transportation, and handling of hazardous materials in shipment. *See* 49 U.S.C. app. §§ 1803 and 1804. Those who transport and/or cause to be transported hazardous materials may be required by the Secretary to file a registration statement once every two years. *See* 49 U.S.C. app. § 1805(b). The registration statement must include the person or entity's name, principal place of business, the location of each activity involving the handling of hazardous materials, a complete list of all such materials being handled, and an averment that the party is in compliance with all applicable criteria established pursuant to the Act. *Id.* Under certain circumstances, the Secretary may grant a two-year exemption from the Act. *See* 49 U.S.C. app. § 1806.

The Act authorizes government officers to enter upon and inspect the records and property of businesses engaged in the shipment and transportation of hazardous substances. The inspection provision reads as follows:

Appendix D

> (c) Inspection. The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> (1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.
>
> Any such officer, employee, or agent shall, upon request, display proper credentials.

49 U.S.C.S. app. § 1808(c) (Law. Co-op. 1990). The Act provides for both civil and criminal penalties. *See* 49 U.S.C. app. § 1809. In addition, the Attorney General may bring an action in district court for equitable relief to redress a violation by any person of any provision of the Act. The court may grant the requested relief and/or any form of mandatory or prohibitive injunctive relief and punitive damages. *See* 49 U.S.C. app. § 1810(a).

The government filed the present action against V-1 Oil, seeking first a preliminary injunction (which the court granted

in an order entered January 13, 1994) and ultimately a permanent injunction and declaration that V-1 Oil may not prevent safety inspectors from entering upon, inspecting, and examining, during V-1 Oil's business hours, the records and properties of the company that relate to the shipment and/or transportation of hazardous materials by rail.

The government contends that it is authorized by the Hazardous Materials Transportation Act to conduct inspections mandated under the Act without a search warrant.[1] V-1 Oil has on several occasions refused to allow the inspectors on its property. V-1 Oil will not let government inspectors from any state or federal agency enter upon any of its properties unless the inspector makes a request in advance, fills out a detailed authorization form which must be signed by the government agent and witnessed (by signature) by two V-1 Oil representatives.[2] Thereafter, the request is taken under advisement, and if later approved by V-1 Oil, a specific date and time is set for when the government agent may come upon the property and conduct an inspection.

This matter is presently before the court on cross motions

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1. It should be noted that the Act does not expressly provide for warrantless searches. However, the Act appears to contemplate such searches, and it has been held that "[c]ourts do not infer a warrant requirement from statutes which authorize inspections but do not discuss the necessity of warrants. Instead, a bare authorization for inspections is construed to authorize warrantless inspections." *V-1 Oil Co. v. State of Wyo., Dep't of Envtl Quality*, 902 F.2d 1482, 1485 (10th Cir. 1990) (citations omitted).

2. The court notes that the form used by V-1 Oil is couched in noticeably combative terms. However, the form and the language contained in it are irrelevant to the specific question before the court.

for summary judgment. These motions have been fully briefed and are ripe for decision. Having carefully reviewed the entire record in this case, the court finds that the facts, the respective argument of the parties, and the substantive law applicable to the case are adequately set forth in the memoranda and related pleadings now on file. Accordingly, oral argument would not benefit the court in resolving the motions. The court further finds that there are no material facts in dispute which would preclude the court from entering judgment as a matter of law. This finding is in keeping with the parties' representation that this matter should be resolved on cross motions for summary judgment.

II. ANALYSIS

A. The Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the nonmoving party fails to make such a showing on any essential element of his case, "there can

be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.[3]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting First Nat'l Bank v. Cities Serv. Co., Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

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3. *See also* Rule 56(e), which provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed R. Civ. P. 56(e).

Appendix D

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

B. Application of the Summary Judgment Standard

The court has carefully reviewed the entire record in this matter, including the affidavits, exhibits, and memoranda filed by the parties, as well as the cases cited therein. Based upon this review, the court concludes that the government's Motion for Summary Judgment shall be granted for the reasons and cases cited by the government, which need not be repeated at great length in this order. Rather, the court will briefly explain its reasoning and conclusions in the discussion to follow.[4]

The United States Supreme Court has established what is now a well-recognized exception to the warrant requirement for administrative searches of commercial premises employed

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4. Much of the following analysis was originally set forth in the Order Granting Preliminary Injunction entered January 13, 1994.

in a "closely regulated" industry. The primary cases include *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry); *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless inspections of the premises of firearms dealers); *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless inspections of mines); and *New York v. Burger*, 482 U.S. 691 (1987) (warrantless searches of automobile junkyards). The Court in *Burger* carefully described the exception and the criteria which must be met in order for a regulatory scheme involving warrantless searches to be upheld.

The Fourth Amendment prohibits unreasonable searches and seizures. This prohibition applies both to private homes and commercial premises. *See v. City of Seattle*, 387 U.S. 541, 543 (1967). An owner of a business has a reasonable expectation of privacy which is to be honored not only in the context of traditional police searches, but also as to administrative inspections to enforce regulatory statutes. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrantless inspections of all businesses engaged in interstate commerce pursuant to OSHA held invalid). Nevertheless, the Supreme Court has declared that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. . . . This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *New York v. Burger*, 482 U.S. at 700.

The administrative search exception to the warrant requirement is referred to as the "Colonnade-Biswell" doctrine. The Supreme Court has made it clear that when a person chooses to engage in a pervasively regulated industry

and accepts a federal license and/or registration, that person does so with the knowledge that his or her business records and premises will be subject to inspection. *United States v. Biswell*, 406 U.S. at 316.

The first question for the court to consider is whether V-1 Oil is engaged in a closely regulated industry. From its inception, the railroad industry has been a heavily regulated industry. In addition, the transportation and use of hazardous materials is also heavily regulated, and rightfully so. Thus, the court finds that to the extent that V-1 Oil engages in the receipt and shipment of hazardous materials by rail, it is engaged in a closely regulated industry.

The court must next look to see if the regulatory scheme under the Hazardous Materials Transportation Act meets the three requirements under *New York v. Burger*. In *Burger*, the Supreme Court held that a warrantless inspection, even within a heavily regulated industry, will be deemed reasonable only if three criteria are met: (1) there must be a "substantial" government interest that informs the regulatory scheme pursuant to which inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. at 702-03. The third criteria mandates that the statute advise the owner of commercial premises that the search is being conducted pursuant to the law, and that the inspection has a defined scope and limits the discretion of the inspecting officer.

The first two criteria are easily met in the case at hand.

First, the government has a substantial interest in regulating the transportation of hazardous materials to protect life and property. Second, the rationale enunciated by the Supreme Court in *United States v. Biswell* (inspection of the premises of firearms dealers) applies equally here: "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection. . . ." *United States v. Biswell*, 406 U.S. at 316. If inspections were to occur pursuant to a warrant, or with the sort of advance notice desired by V-1 Oil, a myriad of violations could be temporarily corrected by the time of inspections, thereby frustrating the inspection effort. The court is persuaded that inspections of entities engaged in the shipment, transportation, and receipt of hazardous materials by rail are more effective when conducted pursuant to unannounced warrantless searches.

The remaining issue is whether the statute's inspection program provides a constitutionally adequate substitute for a search warrant. The inspection program must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. at 600. In addition, the statute must somehow limit the discretion of the inspectors, and inspections must be carefully limited in time, place, and scope. *United States v. Biswell*, 406 U.S. at 315.

The Hazardous Materials Transportation Act clearly states that the Secretary may direct inspectors to enter upon property and inspect the records and properties of persons engaged in the shipment, transportation, and/or receipt of

hazardous materials, to the extent such records and properties relate to packages or containers for use in the transportation of hazardous materials in commerce. The Act is directed to a narrowly defined group of business operators, and inspections are further limited to specific transportation activities and records of hazardous materials shippers. The Act directs that inspections take place at reasonable times and in a reasonable manner. The government seeks to inspect only during V-1 Oil's regular business hours. In addition, Federal Railroad Administration guidelines direct that inspectors minimize any possible disturbances to the business.

The government represents that although inspection of V-1 Oil has been somewhat sporadic, it makes every effort to inspect all rail shippers of hazardous materials on an annual basis. V-1 Oil objects to the apparent randomness and/or irregularity of inspections. It relies on the *Donovan* decision and a Tenth Circuit case, *V-1 Oil Company v. State of Wyoming, Department of Environmental Quality*, 902 F.2d 1482, 1485 (10th Cir. 1990). The Tenth Circuit case is distinguishable from the case at hand because the statute involved in that case applied to every business in the state (similar to OSHA in its comprehensiveness)[5] and, therefore, did not provide a constitutionally adequate substitute for a warrant.

The Supreme Court in *Donovan* held that a warrant is required if searches are "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no

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5. Administrative searches conducted pursuant to statutes of general application require search warrants. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 313-14.

real expectation that his property will from time to time be inspected by government officials." *Donovan v. Dewey*, 452 U.S. at 599. In its decision in the *Burger* case, however, the Supreme Court refined its position somewhat on the question of regularity, holding that inspections must simply be limited as to time, place, and scope. The Court held that limitations on the number of inspections within a given period, or the absence of such a directive, are a factor to be considered in analyzing the adequacy of a particular statute, but that factor is not determinative so long as the statute, as a whole, places adequate limits on the discretion of the inspectors. *New York v. Burger*, 482 U.S. at 711 n. 21.

In its briefing, the government explains its system for setting inspection priorities for businesses within each designated region.[6] The court finds this system to be reasonable. In addition, the court assumes that the frequency of inspections is tied to the amount of funding and personnel available to meet the statutory directive. The court is not

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6. FRA's qualitative analysis findings determine how often hazardous materials facilities are inspected. FRA coordinates its inspection program through the National Inspection Plan ("NIP"). NIP refers to a number of factors in allocating inspection priorities, including accident statistics, regulatory deficiencies reported, risks of transporting designated articles, and number of car movements. FRA's hazardous Materials Specialist ... allocates inspection resources according to results derived from the established criteria.

Reply Br. for Pltf. on Mtn. for Pre. Inj., filed Nov. 4, 1993, at 15-16 (footnotes omitted).

persuaded that, because one business has been inspected at somewhat irregular intervals, the court should find that warrants are required under the Act, especially since warrantless searches have been conducted pursuant to this Act all across the country, apparently without challenge, since 1975.

C. Injunctive Relief

Having concluded that the government is entitled to judgment as a matter of law, the court must next consider whether the government is entitled to permanent injunctive relief. As noted by the United States Supreme Court, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

The government argues that irreparable injury should be presumed because of V-1 Oil's failure to comply with the statute by refusing warrantless inspections. The court concurs with the cases cited by the government in support of this contention. However, this court is ordinarily reluctant to presume irreparable injury, preferring the approach enunciated in a different context by the Supreme Court in *Amoco Production Co. v. Gambell.*

In that case, the Supreme Court declared that irreparable injury is not to be presumed; rather, "[i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 542. Furthermore, while the Supreme Court declared that particular regard should be paid to the public interest when considering the

question of injunctive relief, the public interest does not require the court to grant an injunction automatically every time a statute is violated. *Id.*

With these considerations in mind, the court finds that the government and the public at large face a definite risk of irreparable injury because of the actions of V-1 Oil in interfering with the ability of the government to enforce a statute intended to protect the public. The court further finds that there is no adequate remedy at law to eliminate this risk. V-1 Oil argues that the government has an adequate remedy at law. It suggests that the government need only obtain search warrants to inspect V-1 Oil operations.

The court is not persuaded that this an adequate remedy at law because of the burden that would be placed on the government and the difficult questions of the standard to be met in seeking approval for requested warrants. More importantly, however, is that the statute is intended to operate without search warrants, and the effectiveness of the inspection effort would be substantially diminished if search warrants were required.

In weighing the relative hardships of the parties, it is clear on the one hand that accidents and injury to life and property could occur in the absence of inspections. On the other hand, if an injunction is entered, V-1 Oil will have to accept warrantless inspections. The court is of the opinion that the government's interest in effectively fulfilling its statutory duties and in ensuring the safe handling of hazardous materials through the conduct of surprise inspections prevails between these competing claims of injury. The public also has a substantial interest in the safe handling of hazardous

materials. Thus, the court is of the opinion that the public interest favors issuance of a permanent injunction.

In conclusion, the statute expressly provides for injunctive relief for violation of any of its provisions. 49 U.S.C. app. § 1810.[7] V-1 Oil has violated the statute by refusing to allow warrantless inspections which are clearly provided for in 49 U.S.C. app. § 1808(c). The government and the public face irreparable injury; the government has no adequate remedy at law; and the balance of harms favors the government. For these reasons, the court will enter a permanent injunction along with the requested declaratory relief.

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

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7. **(a) General.** The Attorney General, at the request of the Secretary, may bring an action in an appropriate district court of the United States for equitable relief to redress a violation by any person of a provision of this title, or an order or regulation issued under this title. Such district courts shall have jurisdiction to determine such actions and may grant such relief as is necessary or appropriate, ***including mandatory or prohibitive injunctive relief***, interim equitable relief, and punitive damages.

49 U.S.C.S. app. § 1810(a) (Law. Co-op. 1990)) (emphasis added).

Appendix D

IT IS HEREBY ORDERED that the United States' motion for summary judgment filed on March 4, 1994, should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that V-1 Oil Company's motion for summary judgment filed on March 4, 1994, should be, and is hereby, DENIED.

IT IS HEREBY DECLARED that the United States, specifically the Federal Railroad Administration, has the authority under the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801, *et seq.*, specifically 49 U.S.C. app. § 1808(c), to conduct immediate, unannounced, and warrantless inspections of persons or entities engaged in the shipment, transportation, and receipt of hazardous materials by rail, during regular business hours, for purposes of enforcing the Hazardous Materials Transportation Act and its implementing regulations.

IT IS FURTHER ORDERED that V-1 Oil Company, its officers, employees, and agents, and all persons in active concert or participation with them, should be, and are hereby, PERMANENTLY ENJOINED and RESTRAINED from denying or preventing officers and employees of the Federal Railroad Administration from obtaining immediate, unannounced, and warrantless access to the property and facilities of V-1 Oil Company, wherever located in the United States, during V-1 Oil Company's business hours, to conduct inspections of V-1 Oil Company's records and operations pertaining to the movement of hazardous materials by rail transportation in commerce, for the purpose of enforcing the Hazardous Materials Transportation Act and its implementing regulations.

Appendix D

DATED this 11 day of October, 1994.

s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO DATED OCTOBER 11, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIVIL NO. 93-0333-E-HLR

UNITED STATES OF AMERICA,

Plaintiff,

v.

V-1 OIL COMPANY, INC., d/b/a V-1 PROPANE,

Defendant.

JUDGMENT

Based on the Order on Cross Motions for Summary Judgment entered October 11 , 1994,

IT IS HEREBY DECLARED that the United States, specifically the Federal Railroad Administration, has the authority under the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801, *et seq.*, specifically 49 U.S.C. app. § 1808(c), to conduct immediate, unannounced, and warrantless inspections of persons or entities engaged in the shipment, transportation, and receipt of hazardous materials by rail, during regular business hours, for purposes of enforcing the Hazardous Materials Transportation Act and its implementing regulations.

Appendix E

IT IS FURTHER ORDERED that V-1 Oil Company, its officers, employees, and agents, and all persons in active concert or participation with them, should be, and are hereby, PERMANENTLY ENJOINED and RESTRAINED from denying or preventing officers and employees of the Federal Railroad Administration from obtaining immediate, unannounced, and warrantless access to the property and facilities of V-1 Oil Company, wherever located in the United States, during V-1 Oil Company's business hours, to conduct inspections of V-1 Oil Company's records and operations pertaining to the movement of hazardous materials by rail transportation in commerce, for the purpose of enforcing the Hazardous Materials Transportation Act and its implementing regulations.

DATED this 11 day of October, 1994.

s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO FILED JANUARY 13, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIVIL NO. 93-0333-E-HLR

UNITED STATES OF AMERICA,

Plaintiff,

v.

V-1 OIL COMPANY, INC., d/b/a V-1 PROPANE,

Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

I. FACTS AND PROCEDURE

The plaintiff in this matter is the United States, specifically the Federal Railroad Administration (FRA). The defendant is V-1 Oil Company, Inc., (hereinafter "V-1 Oil") which is engaged in the transportation, shipment, and receipt of petroleum products by rail, including propane (liquified petroleum gas). V-1 Oil later offers these products for sale. V-1 Oil has many branches in the western United States, including two in the State of Idaho — one in Idaho Falls and one in Caldwell.

This case centers around the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801, *et seq.* This

statute was enacted to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the nation adequately from the risks to life and property which are inherent in the transportation of hazardous materials in commerce. *See* 49 U.S.C. app. § 1801. The Secretary of Transportation has delegated to the FRA the authority to administer the statute and its implementing regulations as they relate to the shipment and transportation of hazardous materials by rail. *See* 49 C.F.R. § 1.49(s)(1).

The statute provides that the Secretary of Transportation shall designate particular materials as hazardous, and promulgate necessary regulations regarding the safe shipment, transportation, and handling of hazardous materials in shipment. *See* 49 U.S.C. app. §§ 1803 and 1804. Those who transport and/or cause to be transported hazardous materials may be required by the Secretary to file a registration statement once every two years. *See* 49 U.S.C. app. § 1805(b). The registration statement must include the person or entity's name, principal place of business, the location of each activity involving the handling of hazardous materials, a complete list of all such materials being handled, and an averment that the party is in compliance with all applicable criteria established pursuant to the Act. *Id.* Under certain circumstances, the Secretary may grant a two-year exemption from the Act. *See* 49 U.S.C. app. § 1806.

The Act authorizes government officers to enter upon and inspect the records and property of businesses engaged in the shipment and transportation of hazardous substances. The inspection provision provides as follows:

Appendix F

> (c) Inspection. The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to
>
> > (1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or
> >
> > (2) the transportation or shipment by any person of hazardous materials in commerce.
>
> Any such officer, employee, or agent shall, upon request, display proper credentials.

49 U.S.C.S. app. § 1808(c) (Law. Co-op. 1990). The Act provides for both civil and criminal penalties. *See* 49 U.S.C. app. § 1809. In addition, the Attorney General may bring an action in district court for equitable relief to redress a violation by any person of any provision of the Act. The court may grant the requested relief and/or any form of mandatory or prohibitive injunctive relief and punitive damages. *See* 49 U.S.C. app. § 1810(a).

The government filed the present action against V-1 Oil, seeking first a preliminary injunction and ultimately a

declaration that V-1 Oil may not prevent safety inspectors from entering upon, inspecting, and examining, during V-1 Oil's business hours, the records and properties of the company that relate to the shipment and/or transportation of hazardous materials by rail. The government contends that it is authorized by the Hazardous Materials Transportation Act to conduct inspections mandated under the Act without a search warrant.[1] V-1 Oil has on several occasions refused to allow the inspectors on its property. V-1 Oil will not let government inspectors from any state or federal agency enter upon any of its properties unless the inspector makes a request in advance, fills out a detailed authorization form which must be signed by the government agent and witnessed (by signature) by two V-1 Oil representatives.[2] Thereafter, the request is taken under advisement, and if later approved by V-1 Oil, a specific date and time is set for when the government agent may come upon the property and conduct an inspection.

This matter is now before the court pursuant to the government's Motion for Preliminary Injunction under Rule 65(a) of the Federal Rules of Civil Procedure. The motion has been fully briefed and a hearing was held on January 11, 1994.

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1. It should be noted that the Act does not expressly provide for warrantless searches. However, the Act appears to contemplate such searches, and it has been held that "[c]ourts do not infer a warrant requirement from statutes which authorize inspections but do not discuss the necessity of warrants. Instead, a bare authorization for inspections is construed to authorize warrantless inspections." *V-1 Oil Co. v. State of Wyo., Dep't of Envtl Quality*, 902 F.2d 1482, 1485 (10th Cir. 1990) (citations omitted).

2. The court notes that the form used by V-1 Oil is couched in noticeably combative terms. However, the form and the language contained in it are irrelevant to the specific question berore the court.

Appendix F

II. ANALYSIS

The traditional requirements for a preliminary injunction include the following: "(1) a likelihood of success on the merits and the possibility of irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party seeking relief." *Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987).[3]

It is well established that the district court generally has broad discretion in deciding whether or not to issue a preliminary injunction. Appellate review is limited to ensuring that the district court did not abuse its discretion and/or base its decision on an erroneous legal standard or clearly erroneous finding of fact. *See Oakland Tribune Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985); *Sierra Club v. Marsh*, 816 F.2d at 1381-82.

Upon review and consideration of the memoranda filed by the parties and the arguments of counsel at the hearing, the court finds that the government has made a strong showing of probable success on the merits. The United States Supreme Court has established what is now a well-recognized exception to the warrant requirement for administrative searches of commercial premises employed in a "closely regulated" industry. The primary cases include *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor

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3. *See also, Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (party moving for a preliminary injunction must establish (1) a strong likelihood of success on the merits; (2) the balance of irreparable harm favors the moving party; and (3) the public interest favors the issuance of an injunction).

industry); *United States v. Biswell,* 406 U.S. 311 (1972) (warrantless inspections of the premises of firearms dealers); *Donovan v. Dewey,* 452 U.S. 594 (1981) (warrantless inspections of mines); and *New York v. Burger,* 482 U.S. 691 (1987) (warrantless searches of automobile junkyards). The Court in *Burger* carefully described the exception and the criteria which must be met in order for a regulatory scheme involving warrantless searches to be upheld.

The Fourth Amendment prohibits unreasonable searches and seizures. This prohibition applies both to private homes and commercial premises. *See v. City of Seattle,* 387 U.S. 541, 543 (1967). An owner of a business has a reasonable expectation of privacy which is to be honored not only in the context of traditional police searches, but also as to administrative inspections to enforce regulatory statutes. *See Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) (warrantless inspections of all businesses engaged in interstate commerce pursuant to OSHA held invalid). Nevertheless, the Supreme Court has declared that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. . . . This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *New York v. Burger,* 482 U.S. at 700.

The administrative search exception to the warrant requirement is referred to as the "Colonnade-Biswell" doctrine. The Supreme Court has made it clear that when a person chooses to engage in a pervasively regulated industry and accepts a federal license and/or registration, that person does so with the knowledge that his or her business records and premises will be subject to inspection. *United States v. Biswell,* 406 U.S. at 316.

Appendix F

The first question for the court to consider is whether V-1 Oil is engaged in a closely regulated industry. From its inception, the railroad industry has been a heavily regulated industry. In addition, the transportation and use of hazardous materials is also heavily regulated, and rightfully so. Thus, the court finds that to the extent that V-1 Oil engages in the receipt and shipment of hazardous materials by rail, it is engaged in a closely regulated industry.

The court must next look to see if the regulatory scheme under the Hazardous Materials Transportation Act meets the three requirements under *New York v. Burger.* In *Burger,* the Supreme Court held that a warrantless inspection, even within a heavily regulated industry, will be deemed reasonable only if three criteria are met: (1) there must be a "substantial" government interest that informs the regulatory scheme pursuant to which inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *New York v. Burger,* 482 U.S. at 702-03. The third criteria mandates that the statute advise the owner of commercial premises that the search is being conducted pursuant to the law, and that the inspection has a defined scope and limits the discretion of the inspecting officer.

The first two criteria are easily met in the case at hand. First, the government has a substantial interest in regulating the transportation of hazardous materials to protect life and property. Second, the rationale enunciated by the Supreme Court in *United States v. Biswell* (inspection of the premises of firearms dealers) applies equally here: "[I]f inspection is to be

effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection. . . ." *United States v. Biswell,* 406 U.S. at 316. If inspections were to occur pursuant to a warrant, or with the sort of advance notice desired by V-1 Oil, a myriad of violations could be temporarily corrected by the time of inspections, thereby frustrating the inspection effort. The court is persuaded that inspections of entities engaged in the shipment, transportation, and receipt of hazardous materials by rail are more effective when conducted pursuant to unannounced warrantless searches.

The remaining issue is whether the statute's inspection program provides a constitutionally adequate substitute for a search warrant. The inspection program must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey,* 452 U.S. at 600. In addition, the statute must somehow limit the discretion of the inspectors, and inspections must be carefully limited in time, place, and scope. *United States v. Biswell,* 406 U.S. at 315.

The Hazardous Materials Transportation Act clearly states that the Secretary may direct inspectors to enter upon property and inspect the records and properties of persons engaged in the shipment, transportation, and/or receipt of hazardous materials, to the extent such records and properties relate to packages or containers for use in the transportation of hazardous materials in commerce. The Act is directed to a narrowly defined group of business operators, and inspections are further limited to specific transportation activities and

records of hazardous materials shippers. The Act directs that inspections take place at reasonable times and in a reasonable manner. The government seeks to inspect only during V-1 Oil's regular business hours. In addition, FRA guidelines direct that inspectors minimize any possible disturbances to the business.

The government represents that although inspection of V-1 Oil has been somewhat sporadic, it makes every effort to inspect all rail shippers of hazardous materials on an annual basis. V-1 Oil objects to the apparent randomness and/or irregularity of inspections. It relies on the *Donovan* decision and a Tenth Circuit case, *V-1 Oil Company v. State of Wyoming, Department of Environmental Quality,* 902 F.2d 1482, 1485 (10th Cir. 1990). The Tenth Circuit case is distinguishable from the case at hand because the statute involved in that case applied to every business in the state (similar to OSHA in its comprehensiveness)[4] and, therefore, did not provide a constitutionally adequate substitute for a warrant.

The Supreme Court in *Donovan* held that a warrant is required if searches are "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Donovan v. Dewey,* 452 U.S. at 599. In its decision in the *Burger* case, however, the Supreme Court refined its position somewhat on the question of regularity, holding that inspections must simply be limited as to time, place, and scope. The Court held that limitations on

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4. Administrative searches conducted pursuant to statutes of general application require search warrants. *See Marshall v. Barlow's Inc.*, 436 U.S. at 313-14.

the number of inspections within a given period, or the absence of such a directive, are a factor to be considered in analyzing the adequacy of a particular statute, but that factor is not determinative so long as the statute, as a whole, places adequate limits on the discretion of the inspectors. *New York v. Burger*, 482 U.S. at 711 n.21.

In its briefing, the government explains its system for setting inspection priorities for businesses within each designated region.[5] The court finds this system to be reasonable. In addition, the court assumes that the frequency of inspections is tied to the amount of funding and personnel available to meet the statutory directive. The court is not persuaded that, because one business has been inspected at somewhat irregular intervals, the court should find that warrants are required under the Act, especially since warrantless searches have been conducted pursuant to this Act all across the country without challenge, since 1975.

The government argues that irreparable injury should be presumed because of V-1 Oil's failure to comply with the

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5. FRA's qualitative analysis findings determine how often hazardous materials facilities are inspected. FRA coordinates its inspection program through the National Inspection Plan ("NIP"). NIP refers to a number of factors in allocating inspection priorities, including accident statistics, regulatory deficiencies reported, risks of transporting designated articles, and number of car movements. FRA's Hazardous Materials Specialist . . . allocates inspection resources according to results derived from the established criteria.

Reply Br. for Pl., filed Nov. 4, 1993, at 15-16 (footnotes omitted).

statute by refusing warrantless inspections. The court concurs with the cases cited by the government in support of this contention.[6] In addition, the court finds that there is a genuine risk of irreparable injury to the government and the public because of the actions of V-1 Oil in interfering with the ability of the government to enforce a statute intended to protect the public.

In weighing the relative hardships of the parties, it is clear on the one hand that accidents and injury to life and property could occur in the absence of inspections. On the other hand, if a preliminary injunction is entered, V-1 Oil will have to accept warrantless inspections for the next few months.[7] The court is of the opinion that the government's interest in effectively fulfilling its statutory duties and in ensuring the safe handling of hazardous materials through the conduct of surprise inspections prevails between these competing claims of injury. The public also has a substantial interest in the safe handling of hazardous materials. Thus, the court is of the opinion that the public interest favors issuance of an injunction.

In conclusion, the statute expressly provides for

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6. It should be noted, however, that this court is ordinarily reluctant to presume irreparable injury, preferring the approach enunciated in a different context by the Supreme Court in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). In that case, the Supreme Court declared that irreparable injury is not to be presumed; rather, "[i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 542.

7. The impact of a preliminary injunction would be short-lived as the parties have agreed to expedite this matter and present it to the court on cross-motions for summary judgment within the next few months.

injunctive relief for violation of any of its provisions. 49 U.S.C. app. § 1810. V-1 Oil has violated the statute by refusing to allow warrantless inspections which are clearly provided for in 49 U.S.C. app. § 1808(c). The government has made a strong showing of likely success on the merits. In addition, the government and the public face the possibility of irreparable injury and the balance of harms favors the government. For these reasons, the court will grant the government's Motion for Preliminary Injunction. [8]

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the government's Motion for Preliminary Injunction, filed August 25, 1993, should be, and is hereby, GRANTED. V-1 Oil Company is hereby PRELIMINARILY ENJOINED from preventing inspectors of the Federal Railroad Administration from obtaining unannounced and warrantless access to its facilities at 1800 North Holmes Avenue, Idaho Falls, Idaho, and 824 Simplot Boulevard, Caldwell, Idaho, during V-1 Oil's business hours, to conduct inspections of V-1 Oil's records and operations

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8. V-1 Oil argues that an injunction should not be issued because the government has an adequate remedy at law. It suggests that the government need only obtain search warrants to inspect V-1 Oil operations during the pendency of this action. The court is not persuaded that this is an adequate remedy at law because of the burden that would be placed on the government and the difficult questions of the standard to be met in seeking approval for requested warrants. More importantly, however, is that the statute is intended to operate without search warrants, and the effectiveness of the inspection effort would be substantially diminished if search warrants were required.

pertaining to the movement of hazardous materials by rail transportation in commerce. The preliminary injunction shall remain in effect until this dispute is finally resolved on the merits.

IT IS FURTHER ORDERED that all dispositive motions in this matter shall be filed on or before March 4, 1994. All response memoranda shall be filed on or before March 18, 1994. In light of the fact that the parties have indicated that cross-motions for summary judgment will be filed, no reply memoranda shall be filed. In addition, all motions shall comply with the page limit set by Local Rule 7.1.

DATED this 13 day of January, 1994.

s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX G — RELEVANT STATUTES

CHAPTER 27. HAZARDOUS MATERIALS TRANSPORTATION

49 U.S.C.S. Appx § 1801

§ 1801. Congressional declaration of policy

It is declared to be the policy of Congress in this title to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risk to life and property which are inherent in the transportation of hazardous materials in commerce.

(Jan. 3, 1975, P.L. 93-633, Title I, § 102, 88 Stat. 2156.)

§ 1802. Definitions

* * *

(2) Commerce

The term "commerce" means trade, traffic, commerce, or transportation within the jurisdiction of the United States (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

* * *

Appendix G

(4) Hazardous material

The term "hazardous material" means a substance or material designated by the Secretary under section 18 of this Appendix.

* * *

(11) Person

The term "person" means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or agency or instrumentality of any government or Indian tribe when it offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise, but such term does not include (A) the United States Postal Service, or (B) for the purposes of sections 1809 and 1810 of this title, any agency or instrumentality of the Federal Government.

* * *

(15) Transports or transportation

The term "transports" or "transportation" means any movement of property by any mode, and any loading, unloading, or storage incidental thereto.

* * *

Appendix G

§ 1804. Regulations governing transportation of hazardous materials

(a) General. The Secretary may issue, in accordance with the provisions of section 553 of title 5, United States Code, including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

* * *

Appendix G

§ 1808. Powers and duties of the Secretary

(a) General. The Secretary is authorized, to the extent necessary to carry out his responsibilities under this title, to conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, take depositions, and conduct, directly or indirectly, research, development, demonstration, and training activities. The Secretary is further authorized, after notice and an opportunity for a hearing, to issue orders directing compliance with this title or regulations issued under this title; the district courts of the United States shall have jurisdiction, upon petition by the Attorney General, to enforce such orders by appropriate means.

(b) Records. Each person subject to requirements under this title shall establish and maintain such records, make such reports, and provide such information as the Secretary shall by order or regulation prescribe, and shall submit such reports and shall make such records and information available as the Secretary may request.

(c) Inspection. The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable

manner, the records and properties of persons to the extent such records and properties relate to —

(1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or

(2) the transportation or shipment by any person of hazardous materials in commerce.

Any such officer, employee, or agent shall, upon request, display proper credentials.

* * *

§ 1810. Specific relief

(a) General. The Attorney General, at the request of the Secretary, may bring an action in an appropriate district court of the United States for equitable relief to redress a violation by any person of a provision of this title, or an order or regulation issued under this title. Such district courts shall have jurisdiction to determine such actions and may grant such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

Appendix G

(b) Imminent hazard. If the Secretary has reason to believe that an imminent hazard exists, he may petition an appropriate district court of the United States, or upon his request the Attorney General shall so petition, for an order suspending or restricting the transportation of the hazardous material responsible for such imminent hazard, or for such other order as is necessary to eliminate or ameliorate such imminent hazard. As used in this subsection, an "imminent hazard" exists if there is substantial likelihood that serious harm will occur prior to the completion of an administrative hearing or other formal proceeding initiated to abate the risk of such harm.

(Jan. 3, 1975, P. L. 93-633, Title I, § 111, 88 Stat. 2161.)

APPENDIX H — EXHIBIT 1 - PORTIONS OF THE HAZARDOUS MATERIALS ENFORCEMENT MANUAL

US Department
of Transportation

**Federal Railroad
Administration**

**Hazardous Materials
Enforcement Manual**

Office of Safety

January 1991

Appendix H

* * *

[Page 1-7]

other prior approval is not necessary. Inspectors and other enforcement personnel need only conduct their affairs courteously, including displaying credentials when asked, and in such a manner as to disrupt the facility's business as little as possible.

Simply stated, *any person* affecting the transportation of a hazardous material in commerce is subject to inspection and may be cited for a noncomplying condition under the Act or a regulation issued under the Act.[1] Moreover, *any activity* affecting the transportation of a hazardous material in commerce is subject to investigation and inspection to determine compliance with the underlying statutes and regulations.[2]

Hazardous Materials Regulations

The Hazardous Materials Regulations are developed by the Research and Special Programs Administration's Office of Hazardous Materials Transportation (RSPA/OHMT) in cooperation with representatives of DOT operating administrations (U.S. Coast Guard, Federal Aviation Administration, Federal Railroad Administration, Federal

1. Examples include, but are not limited to, shippers, shipper's agents, consignees, brokers, freight forwarders, and unloaders.

2. Examples include, but are not limited to, loading activities, certification, documentation, handling of hazardous materials shipments, unloading, and placarding.

Appendix H

Highway Administration) and are promulgated by the Director, under authority provided by 49 U.S.C. 1804. RSPA also rules on all petitions for exemptions from the Hazardous Materials Regulations.

The FRA's Associate Administrator for Safety and the Office of Chief Counsel work together in coordinating FRA's input affecting railroad transportation. The Hazardous Materials Division in the Washington Office provides, technical, chemical, engineering, and operating expertise.

* * *

Appendix H

[Page 2-2]

Federal Railroad Administration

Time Allocation and the *National Inspection Plan* for guidance in the allocation of inspection resources.[1]

Inspector Priorities. The allocation of resources will often deviate from the desired goal because of unforseen events. When these events occur, Regional Directors, Specialist and inspectors will base their decisions on the following priorities:

- Accident/incident investigations
- Hazardous material incident investigations (only when the requirements of 171.15 have been satisfied)
- Congressional complaint investigations
- Complaint investigations
- Violation investigations
- Regular inspections and hazardous material incident investigations (when the requirements of 171.16 have been satisfied)

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1. See the Appendix for FRA's *Annual National Inspection Policy on Hazardous Materials Inspectors Time Allocation.*

Appendix H

Beginning, Ending and Times of Inspections and Investigations

Hazardous material inspections and investigation will be conducted during the inspector's normally assigned office hours. Although on certain occasions, inspectors will conduct inspections, investigations, or surveillance activities outside of the established office hours. When an inspection occurs outside of the inspector's normally assigned office hours, the inspector should notify his/her Regional Specialist.

An inspector should give no advance notice of a hazardous material inspection. Although, advance notice of an inspection may be given when it is considered necessary to ensure the availability of records, equipment, officials, or persons to be interviewed.

APPENDIX I — INSPECTION REPORT

[Omitted here but submitted separately as Lodging Appendix.]

APPENDIX J — INSPECTION REPORT

[Omitted here but submitted separately as Lodging Appendix.]

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

(2)

No. 95-1308

In the Supreme Court of the United States

OCTOBER TERM, 1995

V-1 OIL COMPANY, INC., D/B/A V-1 PROPANE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the system of warrantless regulatory inspections of property and records provided by the Hazardous Materials Transportation Act, 49 U.S.C. 1801 *et seq.* (HMTA), comports with the Fourth Amendment.

2. Whether the district court properly enjoined petitioner to comply with searches under the HMTA.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 63 F.3d 909. The order and judgment of the district court (Pet. App. 16a-32a, 33a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on August 24, 1995. A petition for rehearing was denied on November 1, 1995. Pet. App. 1a. The petition for a writ of certiorari was filed on January 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, Congress enacted the Hazardous Materials Transportation Act, 49 U.S.C. 1801 *et seq.* (HMTA or Act), in order "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. App. 1801 (1988); see Pub. L. No. 93-633, 88 Stat. 2156.[1] Although congressional efforts to control the transportation of dangerous materials, especially by rail, date back to the early part of this century,[2] the HMTA provides a comprehensive regulatory scheme affecting the transportation of such materials in commerce, by all modes of transportation. It empowers the Secretary of Transportation to designate various dangerous substances as "hazardous materials," and to promulgate regulations regarding their transportation and handling. 49 U.S.C. App. 1803-1805 (1988 & Supp. V 1993). The Secretary is also specifically authorized to conduct investigations, require the maintenance and submission of reports and records, and conduct

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[1] During the pendency of this action, Congress recodified a number of federal transportation laws, including the HMTA, which now appears at 49 U.S.C. 5101-5127. See Pub. L. No. 103-272, 108 Stat. 745 (1994). As the court of appeals noted, however, that recodification does not make substantive changes in the affected laws, and is in any event not applicable to actions commenced prior to its enactment. Pet. App. 8a n.1; Pub. L. No. 103-272, §§ 6(a), 7(b), 108 Stat. 1378-1379. Like the court of appeals and petitioner, we cite herein to the pre-1994 codification.

[2] See Transportation of Explosives Act, ch. 234, 35 Stat. 554 (1908); 18 U.S.C. 831-835 (1976) (repealed by Pub. L. No. 96-129, § 216(b), 93 Stat. 1015 (1979)).

inspections. 49 U.S.C. App. 1808 (1988 & Supp. V 1993).

Of particular significance to this case, the Act provides:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> * * * * *
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.
>
> Any such officer, employee, or agent shall, upon request, display proper credentials.

49 U.S.C. App. 1808(c) (1988). Section 1808(c) thus authorizes inspections, without notice or warrant, "to the extent" that the property or records at issue relate to the particular activities to which the Act is addressed—*e.g.*, the transportation of hazardous materials in commerce.[3] The statute defines "transportation" to include any movement of hazardous materials, including loading, unloading, and incidental storage. 49 U.S.C. App. 1802(15) (1988 & Supp. V 1993).

The Secretary has promulgated extensive regulations to implement the HMTA, see 49 C.F.R. Pts.

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[3] The other clause of Section 1808(c), not pertinent here, authorizes similar inspections with respect to the manufacture or maintenance of containers for use in the transportation of hazardous materials in commerce. 49 U.S.C. App. 1808(c)(1) (1988).

107, 171-180, including regulations specific to carriage by rail. 49 C.F.R. Pt. 174. The Secretary has delegated to the Federal Railroad Administration (FRA) responsibility for administering the HMTA and all regulations issued under it insofar as they apply to transportation by rail, including carrying out inspections of records or property relating to the transportation of hazardous materials by rail. 49 C.F.R. 1.49(s)(1). Several of the Secretary's regulations are pertinent to this case. First, in accordance with the statutory definition of "transportation," the regulations make clear that the process of unloading a railroad tank car filled with hazardous materials is subject to the Act's requirements. See, *e.g.*, 49 C.F.R. 174.67. The regulations also address the situation of containers (including railroad tank cars) that may contain residual amounts of hazardous materials. 49 C.F.R. 173.29. Although some special provisions are made for such containers, they generally remain subject to the Act and regulations. *Ibid.* Insofar as property or records relate to rail transportation of hazardous materials, FRA inspectors are responsible for inspecting for compliance with all aspects of the requirements of the Act and regulations, including the adequacy of packaging, marking, and labeling, the procedures used in loading and unloading, the securing of container closures, and the documentation of hazardous materials shipments. See, *e.g.*, 49 C.F.R. 172.200-172.204, 172.330(a)(1)(i), 173.31, 174.59, 174.67.

2. Petitioner is a dealer in liquefied petroleum gas (propane) and is active in several western States. Pet. 3-4. Propane is a highly hazardous material, classified as a flammable gas under the HMTA. 49 C.F.R. 173.2, 173.2a, 172.101. Petitioner receives rail

tank cars of propane from suppliers, which it unloads into its own storage facilities. CA ER 195-196.[4] It then sends the unloaded cars—which contain residual amounts of propane—back to the original shipper. Both of those activities are subject to the HMTA and the regulations promulgated thereunder: the receipt and unloading of the rail tank cars constitutes "transportation," and the return of the unloaded cars is subject to regulatory requirements, such as that the cars be properly sealed and marked and that the shipments be properly documented. See 49 C.F.R. 173.29.

On one occasion in 1990, and three occasions from 1992 and 1993, FRA inspectors attempted to conduct unannounced inspections of petitioner's facilities. Pet. App. 5a-6a. Each time, petitioner refused permission to conduct an immediate inspection, indicating that it would permit inspection only after FRA officials completed a form developed by petitioner,[5] after which petitioner would, if it "approved" the request, schedule an inspection. *Ibid.*

3. In August 1993, the United States brought suit against petitioner pursuant to 49 U.S.C. App. 1810(a) (1988), which authorizes district courts to enter injunctive or other relief to remedy violations of the Act. The district court first entered a preliminary injunction, requiring petitioner to submit to war-

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[4] "CA ER" refers to the Excerpts of Record filed by petitioner in the court of appeals.

[5] Petitioner's form, which the district court described as being "couched in noticeably combative terms," required FRA inspectors to identify the purpose of the inspection, to describe their qualifications for performing the inspection, and to "read aloud" the provision of law authorizing the inspection. See Pet. App. 19a & n.2; *id.* at 5a-6a; CA ER 202.

rantless, unannounced inspections. Pet. App. 35a-47a. Pursuant to that injunction, FRA personnel conducted inspections of petitioner's facilities, which revealed a number of deficiencies in its operations. CA ER 225-228, 266-269.[6] The district court later granted the United States' motion for summary judgment, holding that the HMTA provides authority for warrantless inspections, Pet. App. 19a n.1,[7] that such inspections comport with the Fourth Amendment, Pet. App. 22a-28a, and that petitioner's continued refusal to comply with the HMTA, along with the interest in public safety, justified permanent injunctive relief. *Id.* at 28a-30a.

The court of appeals affirmed, holding, based on *New York* v. *Burger*, 482 U.S. 691 (1987), that warrantless inspections by the FRA pursuant to the HMTA comport with the Fourth Amendment. Pet. App. 2a-14a. The court first rejected petitioner's claim that it is not part of the "railroad industry," holding that petitioner's involvement in the rail transportation of propane places it within a pervasively regulated industry. *Id.* at 7a. The court next applied *Burger*'s three-part test for evaluating the validity of warrantless regulatory searches. It held that the first two prongs of the test are "easily satisfied," because the underlying regulatory scheme advances the "substantial governmental interest" in protecting life and property from dangers associated

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[6] Certain of the cited pages (CA ER 225-227) are also reproduced as Pet. App. I, in the "Lodging Appendix" submitted by petitioner.

[7] Petitioner has not challenged that statutory interpretation, either before the court of appeals or in its petition for review by this Court.

with the transportation of hazardous materials, and because unannounced inspections are necessary to "reasonably ensure that the statute is satisfactorily enforced." *Ibid.* (citing *United States* v. *Biswell*, 406 U.S. 311 (1972)). The court also held that the HMTA's inspection program satisfies the final prong of the *Burger* test, because it provides notice to entities such as petitioner that they are subject to periodic inspections, and because it reasonably limits the time, place, and scope of inspections. Pet. App. 7a-9a. Finally, the court held that the district court had not abused its discretion in entering permanent injunctive relief. *Id.* at 9a-10a.[8]

ARGUMENT

The court of appeals correctly applied the Fourth Amendment standards governing inspections of businesses in a closely regulated industry that this Court set out in *New York* v. *Burger*, 482 U.S. 691 (1987). Its decision does not conflict with any other reported decision; rather, as petitioner concedes (Pet. 3, 6), the application of *Burger* to inspections under the HMTA presents a question of "first impression." Nor does petitioner offer any other reason why this Court's review is warranted.

1. The Fourth Amendment's prohibition against unreasonable searches and seizures applies not only to individuals and private residences, but also to corporations and places of business. See *See* v. *City of Seattle*, 387 U.S. 541 (1967). As this Court has re-

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[8] Judge Noonan dissented. Judge Noonan was of the view that the HMTA scheme does not afford sufficient "certainty and regularity" in light of the large number of potentially hazardous materials and in light of what he believed to be the infrequency of FRA inspections. Pet. App. 10a-14a.

cognized, however, although searches of residences ordinarily must proceed pursuant to a search warrant, the Fourth Amendment does not necessarily require a duly-authorized governmental agency to obtain a warrant to inspect a regulated business. See *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76 (1970). That is because, "[w]hen a [person] chooses to engage in [a] pervasively regulated business * * * , he does so with the knowledge that his business records [and facilities] will be subject to effective inspection." *Biswell*, 406 U.S. at 316.

In *Burger*, this Court synthesized its earlier decisions involving regulatory searches and held that such a search comports with the Fourth Amendment where the business in question is part of a "closely regulated" industry, 482 U.S. at 702, and where three criteria are met:

> First, there must be a 'substantial' government interest that informs the regulatory scheme, pursuant to which the inspection is made.
>
> * * * * *
>
> 'Second, the warrantless inspections must be necessary to further [the] regulatory scheme.'
>
> * * * * *
>
> Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.' In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of

> the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

482 U.S. at 702-703 (quotations and citations omitted); see *Donovan* v. *Dewey*, 452 U.S. 594, 600 (1981) (regulatory inspection programs are reasonable where "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes").

As the court of appeals held, those standards were met in this case. Petitioner was plainly involved in a pervasively regulated industry—the transportation of liquid propane—and thus, as the court of appeals observed (Pet. App. 7a), "has a reduced expectation of privacy because it transports, stores, and sells propane gas." Moreover, there is no serious question that ensuring the safe transportation of explosive or otherwise hazardous materials represents a "substantial government interest," *Burger*, 482 U.S. at 702. Congress enacted the HMTA in response to a series of catastrophic hazardous materials accidents, including accidents involving rail transportation. See H.R. Rep. No. 1083, 93d Cong., 2d Sess. 15-16 (1974).

Also unavailing is petitioner's claim (Pet. 15-16) that unannounced inspections are "not necessary to the regulatory scheme," the second criterion under *Burger*. As this Court has explained, that criterion does not require that warrantless searches be ab-

solutely essential in order for the regulatory scheme to have any efficacy, but instead is satisfied where the regulatory program could be "'frustrate[d]'" and be undermined as an "'effective and * * * credible deterrent'" absent unannounced warrantless inspections. *Burger*, 482 U.S. at 710 (quoting *Donovan* v. *Dewey*, 452 U.S. at 600); *Biswell*, 406 U.S. at 316. As the court of appeals recognized (Pet. App. 7a), in the context of the HMTA, "[a]dvanced notice of inspections could permit [petitioner] to temporarily correct violations and frustrate enforcement efforts."

Petitioner's assertion (Pet. 15) that "there is no illegal behavior to deter" on its part is incorrect and, in any event, irrelevant to the Fourth Amendment inquiry. It is undisputed that the FRA's inspections of petitioner's business premises following entry of the preliminary injunction in this case revealed violations of the HMTA. CA ER 225-228, 266-269; Pet. App. I. Moreover, because many of the practices against which the HMTA guards may either be rectified quickly or concealed, advance notice of official inspections would undermine enforcement of the Act. Those practices include the improper securement of rail cars carrying hazardous materials, the use of improper procedures during unloading operations, and the failure to retain proper records that may be urgently needed in the event of a derailment or other release of hazardous materials. Finally, petitioner is wrong to suggest that a dearth of demonstrated violations would indicate a lack of need for unannounced inspections. On the contrary, the goal of having unannounced inspections under the HMTA is to induce a high level of voluntary compliance with HMTA regulations on the part of businesses that cannot be assured that an inspection will

not be forthcoming. As the Tenth Circuit has put the point, an argument like petitioner's that a low incidence of regulatory violations indicates minimal need for an inspection program essentially asks the court to "discount the government interest in any regulatory scheme that has successfully furthered its purpose." *S & S Pawn Shop, Inc.* v. *Del City*, 947 F.2d 432, 437 (10th Cir. 1991).

The third and final criterion of the *Burger* test is whether the statutory scheme serves the basic functions of a warrant, by putting the subject on notice of the prospect of inspection and by limiting the discretion of the inspecting officers. See 482 U.S. at 703. As the court of appeals held, the inspection scheme under the HMTA satisfies that standard, by putting entities such as petitioner on notice that they are subject to periodic inspections, by reasonably limiting the time, place, and scope of inspections and by limiting the discretion of the inspecting officers. Pet. App. 8a-9a.

Petitioner argues (Pet. 11-13) that, given the large number of substances identified as hazardous, "anyone" could be subject to the Act, and thus petitioner was not put on notice of the likelihood of inspection. Under the HMTA, however, the only entities subject to inspection are those that "offer[] hazardous materials for transportation in commerce or transport[] hazardous materials in furtherance of a commercial enterprise." 49 U.S.C. App. 1802(11) (1988 & Supp. V 1993). Moreover, such entities are subject to inspection only "to the extent" that the properties or records in question relate to either the transportation or the shipment of hazardous materials in commerce (or to the manufacture or maintenance of containers for such transportation). 49 U.S.C. App.

1808(c) (1988). As the court of appeals recognized (Pet. App. 8a-9a), those provisions make clear that a business, such as petitioner's, that routinely unloads rail cars containing propane and dispatches cars containing propane residues for return shipment, is subject to inspection.

Petitioner also faults (Pet. 10-11) the court of appeals for referring to the nature of petitioner's business activities in concluding that petitioner was on notice of the possibility of an inspection. See Pet. App. 9a. The court of appeals, however, did no more than explain why the Act itself puts that type of business on notice of the likelihood of inspection. *Ibid.*[9] Petitioner also contends (Pet. 13-14) that the FRA's inspection program under the HMTA lacks "certainty and regularity" because of the purported infrequency with which inspections are conducted. Pet. 13-14. Petitioner's factual assertions about the frequency of inspection are incorrect.[10] In any event, as this Court has noted, the frequency of inspection,

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[9] Nor may petitioner establish a Fourth Amendment violation by speculating that warrantless inspections of other types of businesses under the HMTA would be invalid. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

[10] Petitioner asserts (Pet. 14) that the FRA attempted no inspections before 1990. In the district court, however, the United States presented evidence documenting inspections in 1985, 1986, 1988, and 1989. CA ER 229, 256-259, 270-271, 287-288. While petitioner now asserts that it was "not aware" of those inspections (Pet. 4 n.2), it did not offer any evidence refuting the government's proof.

although a factor to be considered, is "not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of inspecting officers." *Burger*, 482 U.S. at 711 n.21. As the court of appeals held (Pet. App. 9a), the HMTA properly cabins such discretion. *Ibid.* With regard to timing, the Act provides that inspections may be conducted only "at reasonable times and in a reasonable manner." 49 U.S.C. App. 1808(c) (1988). The FRA's Enforcement Manual further provides that inspections are ordinarily to be conducted during normal business hours. CA ER 232. Compare *Burger*, 482 U.S. at 711; *S & S Pawn Shop, Inc.* v. *Del City*, 947 F.2d at 438-439; *Lesser* v. *Espy*, 34 F.3d 1301, 1308-1309 (7th Cir. 1994).

Furthermore, as the court of appeals noted (Pet. App. 9a), "[t]he permissible scope of these searches [under the HMTA] is narrowly defined." The HMTA authorizes inspections only "to the extent that such records or properties relate to" the transportation of hazardous materials in commerce. 49 U.S.C. App. 1808(c) (1988). Thus, while the FRA inspects to determine compliance with regulatory requirements —*e.g.*, whether hazardous materials are marked for shipment, whether tank cars and other packages used for rail transportation are properly secured, whether loading and unloading procedures used for such materials are followed, and whether required documentation of hazardous materials shipments is maintained—it does not inspect the business entity's tax returns or other records unrelated to those regulations. Nor does the FRA conduct inspections of retail stores or other areas unrelated to rail transportation.

2. Petitioner also argues (Pet. 18-19) that the court of appeals erred in upholding the district court's injunction requiring petitioner to submit to inspections pursuant to the HMTA. That argument is derivative of petitioner's claim that the HMTA's provision for warrantless inspections of transporters of hazardous material is unreasonable under the Fourth Amendment. And, as the courts below held, given petitioner's repeated refusals to permit inspections in the past, an injunction was appropriate to permit the FRA to carry out its regulatory responsibilities under the HMTA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

V-1 OIL COMPANY, INC. d/b/a V-1 PROFANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I

FURTHER REASONS FOR GRANTING THE WRIT

The arguments and analysis asserted in the government's Brief for the United States in Opposition erroneously focuses on V-1's activities in interpreting the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 1801 *et seq.* (1988 & Supp. V 1993) rather than the specific language of the Act itself as required under *Burger* and its progeny. This Court has stated that because an owner or operator of a closely regulated business has a reduced expectation of privacy, the traditional Fourth Amendment analysis has a lessened application. *New York v. Burger*, 482 U.S. 691, 702 (1987). However, any warrantless inspection of a closely regulated business will be deemed reasonable *only if* three criteria are met.

> First there must be a substantial governmental interest that informs the regulatory scheme, pursuant to which the inspection is made.
>
> * * *
>
> Second, the warrantless inspections must be necessary to further the regulatory scheme.
>
> * * *
>
> Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

Id. at 702, 703 (quotations omitted).

In regards to this third prong, this Court stated:

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be sufficiently comprehensive and defined that the owner of commercial property *cannot help but be aware* that his property will be subject to periodic inspections undertaken for specific purposes. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be carefully limited in time, place and scope.

Id. at 703 (emphasis added) (citations omitted).

In addressing the constitutional validity of the HMTA, it is the language of the statute itself which must warn an owner of commercial property "that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 703. When interpreting a statute, the reviewing court must first look to the plain meaning of the statute, and if the words are unambiguous, the inquiry ends. *Negonsott v. Samuels*, 507 U.S. 99, 104, (1993). Further, courts will give effect to the plain meaning of the language of a statute. *Schusterman v. United States*, 63 F.3d 986, 989 (10th Cir. 1995). As Justice Noonan, of the Ninth Circuit stated, "The dicta from *Marshall v. Barlows* are clearly qualified by the standard laid down in *Donovan* and *Burger*: there has to be a constitutionally adequate substitute for a warrant, and that substitute must be the statute being enforced." *United States v. V-1 Oil*, 63 F.3d 909, 914 (9th Cir. 1995) (citation omitted) (quotation omitted).

At issue is § 1808(c) of the HMTA that allows for the unannounced and warrantless inspections of a business. Specifically, the HMTA states:

> The Secretary may authorize any officer, employee, or agent to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to —
>
> * * *
>
> (2) the transportation or shipment by any person of hazardous materials in commerce.

49 U.S.C. App. § 1808(c) (1988).

"Person," "transportation" and "hazardous materials" have all been defined within the HMTA. A person, capable of transporting hazardous materials, is defined as:

> an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof, or government, Indian tribe, or agency or instrumentality of any government or Indian tribe when if offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise.

49 U.S.C. § 1802(11) (1988 & Supp. V 1993). Transportation is

defined as "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 U.S.C. § 1802(15) (1988 & Supp. V 1993).

Ninth Circuit Justice Noonan observed that the HMTA defines as hazardous over 2,000 materials. *United States v. V-1 Oil*, 63 F.3d at 913. In addition to the poisonous, flammable and corrosive items listed, many of the items such as, batteries, dry ice, matches, extracts or electric wheelchairs, not normally thought of as hazardous, are included in the hazardous materials list. 49 C.F.R. § 172.101. According to the plain language of the statute then, anyone who transports hazardous materials, regardless of whether it is vanilla extract or propane, is subject to warrantless inspections. Justice Noonan noted this problem when he stated:

> [t]he businesses involved in manufacturing, fabricating, marking, maintaining, reconditioning, repairing, and testing of packages or containers for use in the transportation of such materials must be legion. The list of the materials is so long and so many businesses must be involved in the transportation of the materials in commerce that no business within the enumerated categories could be sure if it would ever be visited by inspectors.

United States v. V-1 Oil, 63 F.3d at 913, 914.

It is this broad, all-encompassing language that fails to adequately notify the owner of a business that his property and records will be subject to periodic inspections. Both the Ninth Circuit and the government, however, erroneously assert that there is some type of language in the statute that meets this third prong of *Burger*. However, neither the Ninth Circuit nor the

government in its Brief in Opposition has offered an analysis within the framework provided by this Court that shows how the FRA "statute" [is] sufficiently comprehensive that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections." *Burger*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Rather, the government states that V-1's own activities provide adequate notice that it may be subject to periodic inspections rather than focusing on the language of the statute. This is a complete misapprehension of the criterion set forth by this Court and overlooks completely the Fourth Amendment standard of reasonableness for a government search "even in the context of a pervasively regulated business." *Burger*, 482 U.S. at 702. *See also United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73, n. 1, 2. (1970); *Donovan*, 452 U.S. at 596.

Using the government's logic, and applying the broad language of the HMTA, owners of a "mom and pop" business who receive and unload their inventory of matches and batteries from a supplier and then either offer them for sale or move them from one store to another will be subject to inspection. There is no limit as to who or what may be inspected, so long as that person or entity transports or ships hazardous materials in commerce. The mere fact that V-1 unloads and stores propane should not be determinative of the constitutional validity of the HMTA.

In applying the three criteria set forth in *Burger*, this Court focused strictly on the specific statute which purported to authorize warrantless searches. The same analysis must take place in this case. In *Burger*, the Court found that the language of the challenged statute itself was sufficient to give business operators notice that they would be subject to inspections. *Burger*, 482 U.S. at 703. Specifically, New York's warrantless

inspection statute of junkyards stated that the search of records applied only to "vehicles or parts of vehicles for which a certificate of title has been issued . . ." *Id.* at 693, n. 1. The statute further stated, "Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition . . ." *Id.* The statute also stated that inspections will take place during the agent's or officer's "regular and usual business hours." *Id.* Finally, in examining the language of the statute, it was determined that inspections could only be made of vehicle-dismantling and related industries and that inspectors could only examine the records as well as any vehicles or parts of vehicles that were subject to the record keeping requirements of the statute. *Id.* at 712.

Upon examining the language of § 1808(c), it becomes clear that such specificity, as was found in *Burger*, is lacking. Where specific records that could be inspected were listed in *Burger*, there is only a general description of "records" in the HMTA. 49 U.S.C. App. § 1808(c) (1988). Where the time for an inspection was listed, "during regular and usual business hours," there is only the general description of "reasonable times." *Burger*, 482 U.S. at 694, 49 U.S.C. App. § 1808(c). Finally, where there was a specific statement of what could be inspected, in addition to the records, namely any vehicles or vehicle parts subject to the record keeping, the HMTA makes a general statement that "records and properties" may be inspected. *Burger*, 482 U.S. at 694, 49 U.S.C. App. § 1808(c) (1988).

Each statute this Court has examined and found Constitutionally valid has been similarly specific in describing what was to be searched and when. In *Biswell*, the statute in question authorized official entry into the premises, including storerooms, during "business hours" of any "firearms or

ammunition dealer" for the purpose of examining the records kept in relation to the business as well as any firearms or ammunition kept or stored. *Biswell*, 406 U.S. at 311, 312. In light of the specificity of the statute, this Court stated that "[t]he dealer is not left to wonder about the purposes of the inspector or the limits of his task." *Id.* at 316.

In *Colonnade*, the inspection statutes allowed for inspection during "business hours" of any "retail liquor dealer" for the purposes of inspecting records pertaining to the sale of "distilled spirits, wines, or beer" and to examine such objects or articles. *Colonnade*, 397 U.S. at 73, n. 1, 2.

In *Donovan*, federal mine inspectors were required to inspect "underground mines at least four times a year and surface mines at least twice a year" to ensure compliance with health and safety standards. If any violations were discovered, follow-up inspections were authorized. *Donovan*, 452 U.S. at 596. In light of the specificity of the statutory language, as well as the certainty and regularity of its application, this Court determined that the statutes in question were a constitutionally adequate substitute for a warrant. *Id.* at 603. In view of this Court's analysis, it is clear that the HMTA fails the third prong in the *Burger* test. There is no certainty or regularity in its application. *Burger* 482 U.S. at 702. *See also United States v. Kaiyo Maru No. 53*, 669 F.2d 989, 996 (9th Cir. 1983) (Inspections conducted once every three weeks were sufficient to notify owners of vessels that they would be searched.)

For fifteen years, no attempt was made to inspect V-1 facilities. However, this is only one element to be considered in determining whether there is any certainty or regularity in the application of the HMTA. The Court must also look to see whether there are adequate limits placed on the inspectors. *Burger*, 482 U.S. at 703. As discussed *supra*, statutes that passed

a Fourth Amendment analysis contained language as to when inspections could be held, (during regular business hours, *id.* at 694; during business hours, *Biswell*, 406 U.S. at 311; *Colonnade*, 397 U.S. at 72; at least four times a year for underground mines and at least twice a year for surface mines, *Donovan*, 452 U.S. at 594.) There is no such limitation in the language of the HMTA. It simply mandates that inspections be conducted at reasonable times. 49 U.S.C. App. § 1808(c) (1988). It is not until one examines the FRA's enforcement manual to see what "reasonable times" means. An FRA inspector may conduct an inspection at any time during his own normally assigned hours, regardless of whether or not those are the same hours a business might operate. If the inspector decides to conduct an inspection outside his normal hours, he need only contact his supervisor first. (App. H, 58a). In addition, these guidelines are subject to change at the FRA's discretion and without warning to V-1 or any other entity ostensibly subject to the HMTA.

The Ninth Circuit attempted to downplay this fact when it discussed the FRA manual. To give the illusion that the HMTA states that inspections may only take place during regular business hours, the Ninth Circuit cited to *Burger* and its language that limited New York inspectors to conducting inspections only during the regular and usual business hours. *United States v. V-1 Oil*, 63 F.3d at 912, 913. However, upon examining the language of § 1808(c), it is clear that this language is missing. 49 U.S.C. § 1808(c) (1988).

The government further attempts to mislead this Court by mischaracterizing V-1's inspection deficiencies. Respondent's Brief at 10. V-1 does not dispute the fact that there were deficiencies. However, the government attempts to categorize these deficiencies as extreme safety violations or violations that can be quickly corrected. Respondent's Brief at 10. The only deficiencies noted in the FRA's inspections of V-1, dealt with the

wrong form being used, a form that is issued by the railroad, incorrect wording on the form, the size of the lettering on placards and other minor, non-safety related errors. (App. I, 59a-61a). Also, V-1 never refused to allow an inspection of its facilities. Respondent's Brief at 5. It did request that FRA inspectors complete a questionnaire, designed to ascertain the inspector's qualifications. Rather than complete the questionnaire and pursue the inspection, the inspectors left the premises. It is these types of examples of how the government is attempting to mislead this Court.

In each of the cases that went into the formulation of the criteria set forth in *Burger*, namely *Colonnade Corp. v. United States*; *United States v. Biswell*; *Donovan v. Dewey*, as well as others cited by the Court, were all premised on warrantless inspection statutes that provided enough specificity that each business involved was placed on notice that they would be subject to inspection. The way § 1808(c) currently reads, the requirement that the "statute must be sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections" is wholly lacking. *Burger*, 482 at 703. If this language is allowed to remain in force and agencies such as the FRA are allowed to continue to conduct unannounced and warrantless inspections under the auspices of its validity, the whole premise and principle of this Court's holding in *Burger* will be destroyed.

CONCLUSION

For this reason, as well as those cited in Petitioner's Brief, the writ should be granted.

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